



Wednesday
July 21, 1999

Part III

**Department of
Defense**

Department of the Army, Corps of
Engineers

**Proposal To Issue and Modify Nationwide
Permits; Notice**

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Proposal To Issue and Modify Nationwide Permits; Notice

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: To improve protection of the aquatic environment, the Corps of Engineers is proposing to issue 5 new Nationwide Permits (NWP) and modify 6 existing NWPs to replace NWP 26 when it expires. The Corps is also proposing to modify 9 NWP general conditions and add three new general conditions. These general conditions will apply to the proposed new and modified NWPs, as well as the NWPs issued on December 13, 1996, when the new and modified NWPs become effective. The proposed new NWPs are activity-specific and authorize activities in all non-tidal waters of the United States, except for non-tidal wetlands adjacent to tidal waters. These proposed new and modified NWPs will allow Corps districts to enhance protection of the aquatic environment, by utilizing the Corps limited resources to review proposed projects, based on the degree of adverse effects on the aquatic environment. The Corps will spend more time on projects with the potential for more environmental damage and less time on projects with minimal adverse effects on the aquatic environment. The Corps has developed, with public and Federal, Tribal, and State agency comments, terms and conditions to ensure that the adverse effects of authorized activities are minimal. A key element of this process by the Corps to develop NWPs with minimal adverse effects on the aquatic environment is regional conditioning developed by district and division engineers. Regional conditioning of NWPs is critical to ensure that the NWPs help the Corps achieve these goals. Regional conditioning of NWPs is necessary to account for differences in aquatic resource functions and values across the country. Regional conditions will be added to the proposed new and modified NWPs by division engineers to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. Concurrent with this **Federal Register** notice, each Corps district will issue a public notice to solicit comments on their final draft

regional conditions for the proposed new and modified NWPs.

The purpose of this **Federal Register** notice is to solicit comments on the final draft of the proposed new and modified NWPs that will replace NWP 26, as well as the NWP general conditions and definitions. Concurrent with this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their final draft regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days. After reviewing the comments received in response to this **Federal Register** notice, the Corps will issue another **Federal Register** notice announcing the issuance of the new and modified NWPs to start the final 60 days for the State and Tribal Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination decisions. After this 60-day period, the new and modified NWPs will become effective as NWP 26 expires.

To improve the implementation of the NWP program, the Corps has combined the NWP general conditions and Section 404 Only conditions into one set of general conditions. The Corps will issue a set of definitions for use with all of the NWPs to provide more consistency in the application of terms commonly used in the NWP program.

Although NWP 26 was scheduled to expire on September 15, 1999, the Corps has extended the expiration date of NWP 26 to December 30, 1999, or until the effective date of the new and modified NWPs, whichever comes first. **DATES:** Comments on the proposed new and modified NWPs must be received by September 7, 1999.

ADDRESSES: HQUSACE, ATTN: CECW-OR, 20 Massachusetts Avenue, NW, Washington, DC 20314-1000. Submit electronic comments to cecwor@hq02.usace.army.mil. See **SUPPLEMENTARY INFORMATION** for file formats and other information about electronic filing of comments.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson at (202) 761-0199 or access the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

SUPPLEMENTARY INFORMATION:**Background**

On December 13, 1996, the Corps of Engineers (Corps) reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWPs prior to the expiration date of NWP 26. In the July

1, 1998, issue of the **Federal Register** (63 FR 36040-36078), the Corps published its proposal to replace NWP 26 by issuing 6 new NWPs, modifying 6 existing NWPs, modifying 6 NWP general conditions, and adding one new NWP general condition. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters of the United States and are not adjacent to interstate or navigable waters. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second.

The new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice could authorize many of the same activities with minimal adverse effects on the aquatic environment that are currently authorized by NWP 26. Most of the proposed new and modified NWPs authorize activities in all non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. These proposed NWPs will ensure that the NWP program is based on the types of authorized activities. Regional conditioning of these proposed NWPs will limit or prohibit their use in high quality waters.

The terms and limits of the proposed new and modified NWPs are intended to authorize activities that typically result in minimal adverse effects on the aquatic environment. For these proposed NWPs, the Corps has also established preconstruction notification (PCN) thresholds to ensure that any activity that may potentially have more than minimal adverse effects will be reviewed by district engineers on a case-by-case basis. Most of the proposed NWPs require submission of a PCN for losses of greater than 1/4 acre of waters of the United States. Most of the proposed NWPs require PCNs for filling open waters, including streams, and for certain proposed NWPs a PCN may be required for filling more than 500 linear feet of stream bed. The PCN requirements for filling stream beds may differ, depending on whether a perennial, intermittent, or ephemeral stream bed is filled. For most of these NWPs, there is no PCN requirement for filling ephemeral stream beds. Excavation of stream beds may require a PCN if the excavation activity results

in a discharge of dredged material, including redeposit other than incidental fallback, into waters of the United States. Regional conditions may be added to NWP by district or division engineers to lower notification thresholds or require notification for all activities authorized by an NWP in order to ensure no more than minimal adverse effects on the aquatic environment.

The 5 new NWPs proposed in this **Federal Register** notice will expire 5 years from their effective date. The proposed 6 modified NWPs (i.e., NWPs 3, 7, 12, 14, 27, and 40) will expire on February 11, 2002, with the other NWPs that were issued, reissued, or modified in the December 13, 1996, **Federal Register** notice (61 FR 65874-65922). The proposed new and modified NWPs are scheduled to become effective on December 21, 1999, and we have extended the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever occurs first. The extension of the expiration date for NWP 26 is discussed in more detail below.

Compensatory mitigation will be required when the District Engineer determines such mitigation is necessary to ensure that the activities authorized by NWPs will result only in minimal adverse effects on the aquatic environment. For a particular project, the District Engineer may determine that compensatory mitigation is not necessary, because the activity will result in no more than minimal adverse effects on the aquatic environment without compensatory mitigation. Some of the NWPs contain requirements for compensatory mitigation for certain activities, particularly for activities that require notification to the District Engineer. Compensatory mitigation will be used to support the goal of no net loss of aquatic resource functions and values by offsetting impacts to the aquatic environment. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or in exceptional circumstances, preservation of aquatic resources either by individual projects constructed by the permittee or the use of mitigation banks, in lieu fee programs, or other consolidated mitigation efforts. For the new and modified NWPs, an important component of compensatory mitigation is the establishment and maintenance of vegetated buffers adjacent to open and flowing waters. Vegetated buffers adjacent to open waters or streams may consist of either uplands or wetlands and help protect and enhance local water quality and aquatic habitat features in the waterbody. Vegetated

buffers can be established by maintaining an existing vegetated area adjacent to open or flowing waters or by planting native trees, shrubs, and herbaceous perennials in areas with little existing perennial native vegetation. The benefits and requirements for vegetated buffers are discussed in further detail below.

During the review of PCNs, district and division engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. District engineers can also place conditions, including compensatory mitigation requirements, on NWP authorizations on a case-by-case basis to ensure that the activity authorized by the NWP results only in minimal adverse effects on the aquatic environment.

For these NWPs, we are placing greater emphasis on regional conditioning to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. Regional conditions allow the NWP program to take into account regional differences in aquatic resource functions and values across the country. Each district will identify areas of high value waters that require lower PCN thresholds or notification for all activities in those waterbodies to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. Division engineers can also suspend or revoke certain NWPs in high value waters if the use of those NWPs would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. The regional conditioning process is discussed in more detail below.

The Corps believes that the new and modified NWPs, with regional conditions, will increase the overall protection of the aquatic environment when compared to the existing NWP program. However, the scope of applicable waters for the proposed NWPs and the proposed NWP General Condition 27, which prohibits the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain, will substantially increase the Corps individual permit workload. The proposed new and modified NWPs, in addition to the existing NWPs, will allow the Corps to efficiently authorize activities with minimal adverse effects on the aquatic environment and focus its efforts on protecting high value aquatic resources. NWPs will be used to authorize most activities in low value

waters. Higher value waters, including wetlands, will receive additional protection through regional conditioning of the NWPs, special conditions on specific NWP authorizations, and case-specific discretionary authority to require an individual permit when necessary. Regional conditions will be required by each district to restrict or prohibit the use of NWPs in high value waters. The Corps will require compensatory mitigation, where appropriate, to ensure that the individual or cumulative adverse effects on the aquatic environment authorized by these NWPs are no more than minimal. NWPs may also be suspended or revoked in some high value waters if the use of those NWPs would result in more than minimal adverse effects on the aquatic environment.

The proposed new and modified NWPs also reflect the Corps increased focus on open or flowing waters. One of the goals of the proposed new and modified NWPs is to improve protection of open waters and streams, especially water quality and aquatic habitat, while continuing to fully protect wetlands. District engineers will not place less consideration on adverse effects to other types of waters for the sake of wetlands, especially low value wetlands. The establishment and maintenance of vegetated buffers adjacent to open waters and streams will protect, restore, and enhance water quality and aquatic habitat. Vegetated buffers can be used to provide out-of-kind compensatory mitigation for wetland impacts where the District Engineer determines that such mitigation for wetland impacts is the best, ecologically, for the aquatic environment.

In addition to regional conditioning of the proposed new and modified NWPs, additional substantial protection of the aquatic environment will result from the modification of two NWP general conditions. We are proposing to modify General Condition 9, Water Quality, to require that postconstruction conditions do not result in more than minimal degradation of downstream water quality. An important component of this general condition is the requirement that, for certain NWPs, the permittee implement a water quality management plan to protect water quality. The water quality management plan may consist of stormwater management facilities or vegetated buffers adjacent to open or flowing waters or wetlands. It is not our intent to replace existing State or local water quality safeguards if those current safeguards are adequate. However, where the State or local program does not ensure that an authorized activity

results in no more than minimal impacts on downstream water quality, the Corps will condition its NWP authorization to contain a water quality management plan. We are also proposing to modify former Section 404 Only condition 6 (now designated as General Condition 21) to require that neither upstream nor downstream areas are subject to more than minimal flooding or dewatering after the project has been constructed and while the authorized activity is operated. General Condition 21 will help ensure that postconstruction effects on local surface water flows are minimal.

On October 14, 1998, the Corps published a supplemental notice in the **Federal Register** (63 FR 55095–55098) requesting comments on additional proposed limitations for the NWP program, including the proposed new and modified NWPs. This **Federal Register** notice also announced the withdrawal of NWP B for master planned development activities from the July 1, 1998, proposal. The additional NWP limitations proposed in the October 14, 1998, **Federal Register** notice, include prohibiting the use of NWPs in certain designated critical resource waters, limiting the use of NWPs in impaired waters, and prohibiting the use of the new NWPs to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain as mapped by the Federal Emergency Management Agency.

As a result of the proposal published on October 14, 1998, we are proposing to add 3 new NWP general conditions. General Condition 25, Designated Critical Resource Waters, prohibits the use of certain NWPs to authorize discharges of dredged or fill material into designated critical resource waters, including wetlands adjacent to those waters. General Condition 25 also requires notification to the District Engineer for activities authorized by certain other NWPs in Designated Critical Resource Waters. General Condition 26, Impaired Waters, restricts the use of NWPs to authorize discharges of dredged or fill material into waters of the United States designated through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. General Condition 26 prohibits the use of NWPs to authorize discharges of dredged material resulting in the loss of greater than 1 acre of impaired waters of the United States,

including wetlands adjacent to those impaired waters. For discharges of dredged material resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, General Condition 26 requires the prospective permittee to notify the District Engineer and clearly demonstrate that the project will not result in further impairment of the listed water. General Condition 27, Fills Within the 100-year Floodplain, prohibits or restricts the use of certain NWPs to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain.

The October 14, 1998, **Federal Register** notice also announced the extension of the expiration date for NWP 26 to September 15, 1999. As a result of the additional time needed to finalize the proposed new and modified NWPs, the Corps has decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever comes first, to ensure that there is no gap between the effective date of the new and modified NWPs and the expiration date of NWP 26. Extending the expiration date of NWP 26 is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities in headwaters and isolated waters that have minimal adverse effects on the aquatic environment until the new and modified NWPs proposed in this **Federal Register** notice become effective. In response to the July 1, 1998, **Federal Register** notice, many commenters recommended that the Corps extend the expiration date of NWP 26 until the proposed new and modified NWPs are issued and become effective. NWP 26 can continue to be used to authorize activities in headwaters and isolated waters until its expiration date. A permittee who receives an NWP 26 authorization prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, prior to the date NWP 26 expires (see 33 CFR Part 330.6(b)). This provision applies to all NWP authorizations unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the NWP authorization in accordance with 33 CFR Part 330.4(e) and 33 CFR Part 330.5 (c) or (d).

The existing NWPs, with the exception of NWP 26, will remain in effect until they expire on February 11, 2002, unless otherwise modified, reissued, or revoked. Some of the

proposed new and modified NWPs can be used with existing NWPs to authorize activities with minimal adverse effects on the aquatic environment. The use of more than one NWP to authorize a single and complete project is addressed in the proposed modification of General Condition 15, Use of Multiple Nationwide Permits.

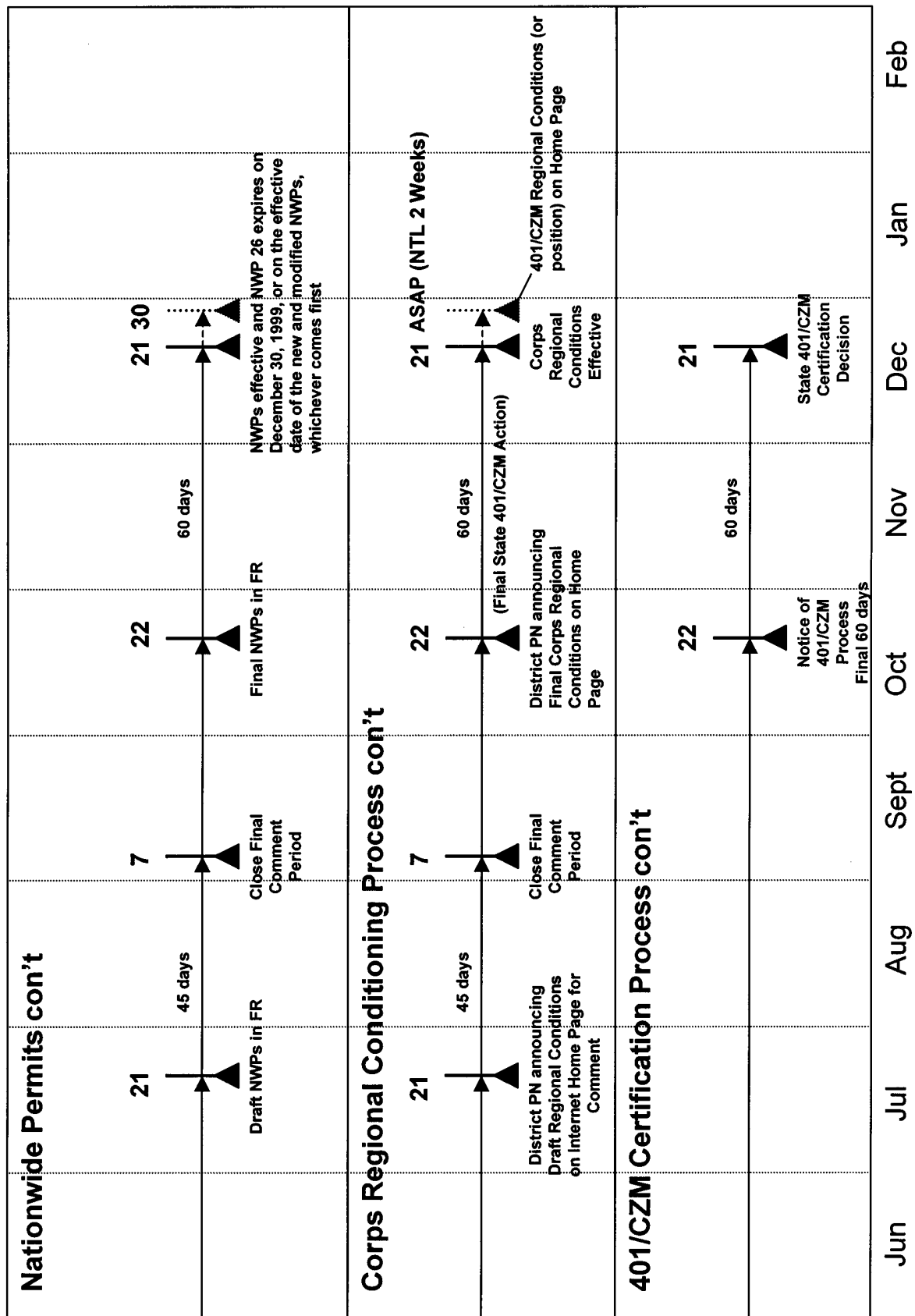
The October 14, 1998, **Federal Register** notice also discussed the need for additional opportunities for public comment on the new and modified NWPs and regional conditions. We have modified the process for additional opportunities for public comment to allow for more effective implementation of the proposed new and modified NWPs.

The revised process for issuing the proposed new and modified NWPs is illustrated in Figure 1. Figure 1 does not contain the previous steps in the development of the proposed new and modified NWPs. The revised process starts with today's publication of the draft new and modified NWPs in the **Federal Register** for a 45-day comment period, with concurrent public notices issued by Corps district offices to solicit comments on draft Corps regional conditions for these NWPs. Comments addressing the draft new and modified NWPs, general conditions, and definitions should be sent to HQUSACE, at the address cited in the ADDRESSES section of this **Federal Register** notice. Comments addressing draft Corps regional conditions should be sent to the appropriate Corps district office. After this 45-day comment period, we will review the comments concerning the proposed NWPs that were received in response to this **Federal Register** notice, each district will review the comments concerning their final draft regional conditions that were received in response to their public notices, and Corps divisions will complete the supplemental decision documents for the Corps regional conditions. On October 22, 1999, the Corps will announce the issuance of the final new and modified NWPs in the **Federal Register** to begin the final 60-day State and Tribal Section 401 water quality certification and Coastal Zone Management Act (CZMA) consistency determination processes. Concurrent with the publication of the final new and modified NWPs in the **Federal Register**, each Corps district will publish a public notice announcing their final Corps regional conditions for the new and modified NWPs, so that the 401 and CZMA agencies can make their decisions based on the new and modified NWPs and the Corps regional conditions. After this 60-day 401/CZMA

period, the new and modified NWP
and Corps regional conditions will
become effective.

BILLING CODE 3710-92-P

Figure 1 - 1999 Nationwide Permit Milestones - Part II



Jun Jul Aug Sept Oct Nov Dec Jan Feb

The proposed new and modified NWP's will help implement the President's Wetlands Plan, which was issued by the White House Office on Environmental Policy on August 23, 1993. A major goal of this plan is that Federal wetlands protection programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the aquatic environment. The proposed new and modified NWP's will more clearly address individual and cumulative adverse effects on the aquatic environment, ensure that those adverse effects are minimal, address specific applicant group needs, and provide more predictability and consistency to the regulated public. Throughout the development of these NWP's, the Corps recognized the concerns of the natural resource agencies and environmental groups for the potential adverse effects on the aquatic environment resulting from activities authorized by these NWP's and the regulated public's need for certainty and flexibility in the NWP program.

Electronic Access and Filing Addresses

You may submit comments by sending electronic mail (e-mail) to: cecwor@hq02.usace.army.mil

Submit electronic comments as an ASCII file and avoid the use of any special characters and any form of encryption. Identify all electronic comments by including the phrase "Draft 1999 NWP's" in the subject line of electronic mail messages. Comments sent as attachments to electronic mail messages should be in ASCII format to ensure that those attachments can be read by HQUSACE.

Discussion of Public Comments

I. Overview

Approximately 10,000 comments were received in response to the July 1, 1998 **Federal Register** notice, district public notices, and national and regional public hearings. The Corps reviewed and fully considered all comments received in response to the July 1, 1998, **Federal Register** notice. Most of these comments were in opposition to the proposed NWP's. Less than 300 commenters were in favor of the proposed new and modified NWP's. A number of commenters stated that NWP 26 is currently working well and does not need to be replaced. Of the 10,000 comments, approximately 8,000 were form letters and postcards that

provided no substantive or constructive comments. Members of environmental groups and development groups were typically in opposition to the proposed new and modified NWP's. The environmental community opposed the proposed NWP's, asserting they would allow too much impact on the aquatic environment. The development community opposed the proposed NWP's, asserting they are too restrictive on the regulated public. Many commenters provided specific comments, recommending changes to the NWP's, general conditions, and definitions. A few commenters provided comments relating to 33 CFR Part 330, the regulations for the implementation of the NWP program. It should be noted that the proposal published in the July 1, 1998, **Federal Register** was a proposal to issue new and modified NWP's and modify some NWP general conditions. We did not propose any changes to 33 CFR Part 330. We have reviewed these comments, but will not modify 33 CFR Part 330 at this time. Some commenters suggested additional issues for the Corps to consider for the NWP program. These new issues are discussed elsewhere in this **Federal Register** notice.

On August 19, 1998, the Corps held a public hearing in Washington, D.C. on the proposed NWP's. In addition to the national public hearing, Corps division offices held 12 regional public hearings in other parts of the country. The purpose of these public hearings was to provide interested parties with another forum to comment on the proposed new and modified NWP's. Transcripts from these public hearings were also reviewed and considered for changes to the NWP's and general conditions.

The Corps received nearly 1,000 comments in response to the October 14, 1998, **Federal Register** notice. Many commenters objected to the proposed additional restrictions to the NWP and some favored the proposed changes. The comments received in response to the October 14, 1998, **Federal Register** notice are also discussed below.

II. General Comments

Most commenters opposed the new and modified NWP's, but many commenters expressed support for the activity-based nature of the NWP's and the balanced approach of the general conditions and preconstruction notification (PCN) requirements. Some commenters stated that the NWP's should be based on impacts, not activities. Some commenters considered the proposed NWP's to be too restrictive, but the majority of commenters believe that the proposed NWP's are too broad

in scope. Many commenters objected to the new and modified NWP's, because they authorize the loss of up to 3 acres of wetlands without the opportunity for public comment. A large number of commenters remarked that the proposed NWP's and general conditions are too complex. Some of these commenters stated that the complexity of the new and modified NWP's is contrary to the goal of streamlining the Corps regulatory program. One commenter stated that the Corps should revise NWP 26 to make it specific to the needs of each state, instead of developing broad NWP's with national applicability. Many commenters requested that the Corps extend the comment period, due to the complexity of the proposal.

Commenters opposed to the issuance of the proposed NWP's stated that the NWP's should be more restrictive. These commenters cited the fact that the new NWP's apply to virtually all non-tidal waters of the United States, which they believe results in less protection of the aquatic environment. Many of these commenters stated that the Corps intent to replace NWP 26 with NWP's that are more protective of the aquatic environment is not accomplished by the proposed NWP's. These commenters requested that the Corps withdraw the proposed new and modified NWP's and develop NWP's that are more protective of aquatic resources. Some commenters said that the environmental protection provided by the NWP's will be reduced by the absence of review by the Corps and the absence of site visits. Many commenters requested that the Corps modify the proposed new NWP's to provide more protection for wetlands and small streams. Several commenters stated that the proposed NWP's help promote sprawl development by making it easier to fill wetlands.

We disagree with the assertion that the proposed new and modified NWP's reduce protection of the aquatic environment. The terms and conditions of these NWP's contain provisions that provide more protection of aquatic resources. For example, NWP's 39 and 43 require that prospective permittees submit a statement with the PCN describing how impacts to waters of the United States have been avoided and minimized and explaining why additional avoidance and minimization cannot be achieved on the project site. In addition, some of the proposed NWP's require compensatory mitigation to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, a water quality management plan to protect the local aquatic environment, especially downstream water quality, and

management of water flows to ensure that downstream flow conditions are maintained and that the authorized work can withstand expected high flows.

For the proposed new and modified NWP, we have directed our district offices to regionally condition these NWP to provide additional protection for high value waters. Most of these NWP do not authorize activities in non-tidal wetlands adjacent to tidal waters.

The proposed new and modified NWP require submittal of a PCN to the Corps for many activities authorized by those NWP. We believe that we have established PCN thresholds that will require Corps review of any activity that has the potential to result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. District engineers will review these activities to ensure that they comply with the terms and conditions of the NWP and result in minimal adverse effects on the aquatic environment. District and division engineers can lower PCN thresholds when necessary to review additional projects. Through the PCN process, district engineers can add case-specific conditions and require compensatory mitigation to further protect the aquatic environment and replace aquatic resource functions and values that are lost as a result of the authorized work. The PCNs will also allow district engineers to monitor the cumulative adverse effects of activities authorized by NWP. The new NWP do not promote sprawl development. Zoning and land use are the responsibilities of State, Tribal, and local governments. If the construction of a new development involves the discharge of dredged or fill material into waters of the United States, the NWP can be used to satisfy Section 404 permit requirements, provided the activity complies with the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment. If the proposed work does not comply with the NWP, then a regional general permit, if applicable, or an individual permit will be required.

Many commenters objected to the proposed NWP, stating that these NWP are contrary to the Administration's Clean Water Action Plan (CWAP). These commenters cited one of the goals of the CWAP, which is to achieve a net gain of 100,000 acres of wetlands per year by 2005.

This goal of the CWAP will be achieved primarily through other Federal programs, including the Wetland Reserve Program and the

Conservation Reserve Program of the U.S. Department of Agriculture (USDA), the Corps environmental restoration programs, the Department of Interior's Partners for Fish and Wildlife program, and the North American Wetlands Conservation Act. Non-federal programs will also contribute to this goal. USDA's programs are estimated to provide 125,000 to 150,000 acres of wetlands per year and the other Federal programs are expected to provide an additional 40,000 to 60,000 acres of wetlands per year toward this goal. The Corps regulatory program is not expected to contribute substantial additional wetland acreage to this CWAP goal, but the District Engineer may require compensatory mitigation for activities authorized by NWP to offset losses of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. The Corps does expect to continue its documented programmatic no net loss of wetlands approach to the Regulatory Program.

A number of commenters stated that the proposed NWP increase the complexity of the NWP program, thereby decreasing efficiency and flexibility. Many commenters assert that the proposed NWP are too restrictive and will increase the burden on the regulated public because of the notification requirements and the difficulty in interpreting these NWP. A number of commenters stated that the proposed NWP will increase the processing time and workload for permit applicants and the Corps.

We recognize that the proposed new and modified NWP increase the complexity of the NWP program, but we believe that this increase in complexity is necessary to protect the aquatic environment while authorizing activities with minimal adverse effects on the aquatic environment in an efficient and effective manner. The proposed new and modified NWP will be used to prioritize workload in non-tidal waters. In high value waters, additional protection will be provided by regional conditioning or suspending or revoking certain NWP if the use of those NWP would result in more than minimal adverse effects on the aquatic environment. The NWP will be used to efficiently authorize activities in low value waters. It is likely that most project proponents will design their projects to comply with the new and modified NWP rather than applying for authorization through the individual permit process. The proposed new and modified NWP, with the three proposed NWP general conditions, will substantially increase processing times

and the Corps workload. Prohibiting the use of NWP 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain will result in large increases in the number of individual permit applications processed by the Corps.

Some commenters remarked that the proposed NWP have taken on elements of the individual permit review process, such as Section 404(b)(1) analysis, mitigation sequencing, and no net loss. One of these commenters recommended replacing the proposed NWP with NWP that authorize activities on a generic basis with specific limits but no reporting requirements. One commenter recommended retaining NWP 26, but modifying it to authorize activities below headwaters, because it would be simpler than the proposed NWP.

While there are some similarities between the individual permit review process and the NWP, there are also important differences. General Condition 19 requires that permittees avoid and minimize losses of waters of the United States on the project site to the maximum extent practicable and states that the District Engineer can require compensatory mitigation to offset losses of waters of the United States that result from the authorized work to ensure that the adverse effects on the aquatic environment are minimal. This general condition is similar, but not identical to the Section 404(b)(1) analysis required for Section 404 individual permits. It is important to note that an off-site alternatives analysis is not required for activities authorized by NWP, or any other general permit. The Section 404(b)(1) analysis required for individual permits requires analysis of off-site alternatives to determine if a practicable, less environmentally damaging, alternative exists to the proposed work on the original site.

To replace NWP 26 with NWP that authorize activities on a generic basis would be contrary to Section 404(e) of the Clean Water Act. Activities authorized by general permits, including NWP, must be similar in nature and result only in minimal adverse effects on the aquatic environment, individually or cumulatively. Each of the proposed new and modified NWP is activity-specific, authorizing activities that are similar in nature. Removing the reporting requirements from the new and modified NWP would increase the probability that the NWP would be used to authorize activities that result in more than minimal adverse effects on the aquatic environment. District

engineers utilize the PCN process to review proposed activities to determine if they comply with the terms and conditions of the NWP, including the statutory requirements of Section 404(e). The only way the Corps can issue an NWP without PCN requirements would be to lower the acreage limit to an extremely low level to ensure that all activities authorized by the NWP would result in minimal adverse effects on the aquatic environment. This would substantially reduce the utility of the NWPs, result in unacceptable increases in the number of individual permits for minor activities processed by the Corps, and severely limit the effectiveness and utility of the NWP program.

Modifying NWP 26 to authorize activities below headwaters would not accomplish the intent of the new and modified NWPs because such a modification of NWP 26 may not satisfy the statutory requirements of Section 404(e). One of the criticisms of NWP 26 is that many people believe that it does not satisfy the "similar in nature" requirement of Section 404(e) of the Clean Water Act. We believe that the activity-specific new and modified NWPs clearly satisfy all of the requirements of Section 404(e).

One commenter stated that the proposed NWPs change a goal of the Section 404 program from one of "no net loss" of wetlands to one of "no net loss of aquatic resource functions and values." This commenter also said that focusing on the effects of non-point source discharges on water quality is the responsibility of the states, not the Corps. A couple of commenters stated that, in the July 1, 1998, **Federal Register** notice, the Corps is inappropriately expanding the Administration's "no net loss" goal for wetlands to other types of waters of the United States. These commenters believe that this expansion should be subject to public comment instead of including it with the proposed new and modified NWPs. One of these commenters objected to requiring compensatory mitigation for losses of non-wetland waters of the United States and that the Corps should focus only on achieving the goal of "no net loss" of wetland acreage. This commenter also objected to applying the "no net loss" goal to a watershed basis instead of to the nation as a whole. Some commenters recommended that the final NWPs contain a statement that the "no net loss" principle is applicable only for wetlands and that compensatory mitigation for losses of other types of waters of the United States should only be required to ensure that the authorized work, with compensatory

mitigation, results in minimal adverse effects on the aquatic environment. Another commenter recommended that "no net loss" should be required for the NWP program.

Although one of the Administration's five principles for Federal wetlands policy is the goal of no net loss of wetlands, it is important to consider the functions and values of wetlands, as well as other aquatic resources. The Section 404 program has always regulated activities in all waters of the United States, not just wetlands. Streams and other open water habitats are extremely important components of the aquatic environment, and are as important as wetlands. The proposed new and modified NWPs place a greater emphasis on open waters to provide those areas with the additional protection that we believe is warranted. It is also important to remember the goals of the Clean Water Act and the importance of Section 404 in meeting those goals. Indeed, the Corps authority to regulate and protect open waters is clearer within the statutory framework than our authority to regulate wetlands. For instance, as a condition of a Section 404 permit, the Corps can require vegetated buffers adjacent to streams to offset adverse effects of the authorized activity on water quality.

Although certain statements in the July 1, 1998, **Federal Register** notice appear to expand the Administration's goal of no overall net loss of the Nation's remaining wetlands to other waters of the United States, such as streams, it is important to note that wetlands are only one component of the overall aquatic environment. By requiring compensatory mitigation for activities in other aquatic areas, such as streams, we are providing better overall protection for the aquatic environment. For the NWP program, the purpose of compensatory mitigation is to ensure that the authorized activities result in minimal adverse effects on the aquatic environment, individually or cumulatively, not to achieve "no net loss" of wetland acreage. Compensatory mitigation may be required by district engineers for losses of any type of water of the United States, not just wetlands. Such compensatory mitigation requirements do help contribute to the "no net loss" of wetlands goal, but in some cases district engineers may determine that compensatory mitigation is unnecessary because the adverse effects of the authorized work are minimal, without compensatory mitigation. It is important to note that NWP compensatory mitigation requirements are not driven by the "no net loss" goal, but will help support that

goal. For the NWP program, the need for compensatory mitigation is assessed on a case-by-case basis and a watershed basis, not a national basis, to ensure that the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. The programmatic goal of no net loss of wetlands is embodied in several Corps guidance documents, including former NWP issuance documents. The underlying principle is that the Corps will require compensatory mitigation to offset functions and values of aquatic resources, including wetlands, that are lost as a result of permit actions. Within the NWP program, the Corps will require compensatory mitigation to offset losses of functions and values of aquatic resources, including wetlands, to the extent that the NWPs authorize activities with no more than minimal adverse effects on the aquatic environment. On a watershed basis, this will normally result in no net loss of any important aquatic functions, not just wetlands.

One commenter requested that the Corps regulations should be consolidated as part of the proposed changes to the NWPs, because the Corps and the regulated public must consult multiple **Federal Register** notices for changes that have occurred over the past 12 years since the last consolidated rule was published. Another commenter stated that the Wetland Delineator Certification Program (WDCP) should be finalized to increase efficiency of the Corps regulatory program. Several commenters objected to the proposed NWPs because they authorize activities that are not water dependent.

The proposal to issue new and modified NWPs and general conditions does not constitute rulemaking. The current NWP regulations were issued on November 22, 1991, and the purpose of the proposal published in the **Federal Register** on July 1, 1998, is merely to issue and modify NWPs in accordance with the regulations at 33 CFR Part 330. The public can obtain a copy of the consolidated Corps regulations at 33 CFR Parts 320 to 330 by purchasing a copy of the appropriate Code of Federal Regulations published annually by the U.S. Government Printing Office or obtain a copy through the Internet at <http://www.access.gpo.gov/nara/index.html#cfr>. The Corps has not finalized the WDCP and has not determined when the program will be implemented.

On a case-by-case basis, NWP activities are not subject to the requirements for a Section 404(b)(1) alternatives analysis, including the

water dependency test. General Condition 19 of the NWP requires permittees to avoid impacts to the aquatic environment on-site to the extent practicable. However, no off-site alternatives test is ever conducted for any general permit activity, including NWPs. In addition, the water dependency test in the Section 404(b)(1) Guidelines does not require that all activities in waters of the United States must be water dependent to fulfill its basic project purpose (see 40 CFR Part 230.10(a)(3)). The vast majority of all activities permitted by the Corps are not water dependent. NWPs can authorize activities in special aquatic sites, provided they result in minimal adverse effects on the aquatic environment, individually or cumulatively, and impacts to the aquatic environment have been avoided on-site to the extent practicable.

One commenter stated that the acreage limits and PCN thresholds for the NWPs should be more consistent. Another commenter recommended that the acreage limits for the NWPs should be $\frac{1}{2}$ or 1 acre and 200 linear feet of stream bed. A third commenter suggested an acreage limit of $\frac{1}{4}$ acre for all NWPs. One commenter recommended that the Corps decrease the acreage limits of the new NWPs because permittees will reduce the scope of work to comply with those lower acreage limits, resulting in better protection of the environment and reducing wetland losses.

We disagree that the acreage limits for the NWPs should be the same, but we have made the PCN thresholds more consistent by changing the PCN threshold to $\frac{1}{4}$ acre for most of the new and modified NWPs. For open and flowing waters, the PCN requirements will still vary among these NWPs. We also disagree with imposing an upper limit for linear feet of stream impacts. We have changed the prohibition against filling greater than 500 linear feet of stream under NWP 26 to a PCN requirement. NWP 39 has a PCN requirement for any discharges into open waters, including streams. The PCN requirement for impacts to stream beds will allow district engineers to review those projects to ensure that they result only in minimal adverse effects on the aquatic environment. Division engineers can also regionally condition NWPs to lower the acreage limits and PCN thresholds. Although many project proponents will design their projects to comply with the terms and conditions of the NWPs, there is a lower limit where such incentives no longer work and it would be more cost effective for the regulated public to pursue

individual permits, which may result in even greater adverse effects on the aquatic environment. With the proposed new and modified NWPs, we believe that we have developed NWPs that balance environmental protection with development activities by providing the districts with the ability to use NWPs to authorize most activities with minimal individual or cumulative adverse effects on the aquatic environment while protecting high value areas with regional conditions.

Expiration of Nationwide Permit 26

In the July 1, 1998, **Federal Register** notice, we proposed to change the expiration date of NWP 26 from December 13, 1998, to March 28, 1999. Many commenters objected to the proposed extension of the expiration date for NWP 26. A number of commenters requested that the Corps retain NWP 26 until the proposed new and modified NWPs become effective. Other commenters suggested that the Corps change the expiration date of NWP 26 to February 11, 2002, to continue to authorize projects that will not be authorized by the new and modified NWPs. One commenter expressed concern about confusion resulting from different expiration dates for the NWPs.

Due to changes in the schedule and process for developing and implementing the new and modified NWPs to replace NWP 26, the Corps announced in the October 14, 1998, issue of the **Federal Register** the extension of the expiration date of NWP 26 to September 15, 1999, to allow for additional public comment on the new and modified NWPs, general conditions, and regional conditions. Since the proposed new and modified NWPs and regional conditions will not become effective before September 15, 1999, we have decided to extend the expiration date of NWP 26 to December 30, 1999, or the effective date of the new and modified NWPs, whichever occurs first, to allow the continued use of NWP 26 until the new and modified NWPs become effective. Extending the expiration date of NWP 26 until the effective date of the new and modified NWPs is necessary to ensure fairness to the regulated public by continuing to provide an NWP for activities with minimal adverse effects in headwaters and isolated waters until the new activity-specific NWPs become effective. If the expiration date of NWP 26 is not extended, most project proponents would have to apply for individual permits, although some activities may be authorized by other NWPs or regional general permits. For those activities

with minimal adverse effects on the aquatic environment, it would be unfair and unnecessarily burdensome on the regulated public to require an individual permit.

We will not extend the expiration date of NWP 26 to February 11, 2002, to authorize those activities that do not qualify for the new and modified NWPs. Such action would be contrary to our intent, which is to replace NWP 26 with activity-specific NWPs. However, the Corps does not intend to allow a lapse in time to occur between the effective date of the new and modified NWPs and the expiration date of NWP 26. Activities that were previously authorized by NWP 26, but could not be authorized by the proposed new and modified NWPs may be authorized by individual permits, other NWPs, or regional general permits.

In response to the October 14, 1998, **Federal Register** notice, a large number of commenters supported the extension of the expiration date of NWP 26, but a few commenters objected to the time extension. Several commenters stated that the Corps should not set a specific expiration date for NWP 26, to ensure that it is available until the new and modified NWPs become effective. A number of commenters said that the October 14, 1998, **Federal Register** notice was unclear as to whether the expiration date for NWP 26 is extended to September 15, 1999; it appeared to these commenters that the new expiration date was published for public comment. One of these commenters requested that the Corps clearly state in this **Federal Register** notice the new expiration date for NWP 26. Two commenters expressed concern about the expiration of NWP 26 authorizations for projects which already have been authorized by this NWP.

The expiration date for NWP 26 was changed to September 15, 1999, as announced in the October 14, 1998, **Federal Register** notice. The new expiration date was not subject to public comment in that notice. It is necessary to set a firm expiration date for NWP 26 to minimize confusion for the regulated public during the process of developing and implementing the new and modified NWPs.

In accordance with 33 CFR Part 330.6(b), permittees with a valid NWP 26 authorization have up to one year to complete the authorized work, provided they start the work or are under contract to do the work prior to the expiration of the NWP. This provision of the NWP regulations is not affected by the proposed new and modified NWPs. Any activities authorized by NWP 26 that have not commenced or are not under

contract prior to the expiration of NWP 26 must be reauthorized by another NWP, a regional general permit, or an individual permit. Some of these projects may be authorized by the proposed new and modified NWPs, provided those projects meet the terms and conditions of those NWPs.

State, Tribal, and EPA Section 401 Certification of the NWPs

One commenter stated that the Corps denial of an NWP authorization based on the denial of the Section 401 water quality certification (WQC) by States, Tribes, or EPA prevents applicants from pursuing an individual permit. According to the commenter, applicants are required to obtain an individual, project-specific WQC. A number of commenters objected to the Corps practice of issuing provisional NWP verifications where WQC has been denied by the State, Tribe, or EPA. One commenter stated that NWPs should not be used in states where WQC has been denied or the NWP activity is determined to be inconsistent with the State's Coastal Zone Management Act (CZMA) plan. These commenters believe that individual permits should be required instead.

Denial of WQC for an NWP should not be the sole reason for requiring individual permit review for activities that would otherwise comply with the terms and conditions of the NWP. A denial of WQC by a State, Tribe, or EPA for an NWP does not mean that the activities authorized by that NWP will result in more than minimal adverse effects on the aquatic environment. The WQC denial only indicates that the NWP activity may not meet the water quality standards for that State or Tribal land in all situations. For specific projects that meet the water quality standards, the 401 agency can issue an individual WQC or waive the WQC requirement. If a specific project does not meet the water quality standards and the 401 agency denies WQC for that project, then that particular project cannot be authorized by an NWP or an individual permit unless the WQC is later issued or waived.

Although the Corps makes every effort to work closely with States, Tribes, or EPA to facilitate Section 401 water quality certification for activities authorized by NWPs, we have an obligation to the regulated public to provide timely NWP authorizations for projects that meet the terms and conditions of the NWPs and result in minimal adverse effects on the aquatic environment, individually and cumulatively. Therefore, if a project qualifies for NWP authorization, we

should issue a provisional NWP verification that is not valid until the permittee obtains an individual WQC or CZMA consistency determination or waiver and a copy is sent to the Corps. These provisional NWP verifications indicate that the permittee cannot commence work until the WQC or CZMA determination is obtained or waived.

The final WQC and CZMA determination processes for the new and modified NWPs will begin with the publication of the **Federal Register** notice announcing the issuance of the NWPs. This **Federal Register** notice is scheduled to be published on October 22, 1999. Concurrent with that **Federal Register** notice, Corps districts will publish public notices announcing their final Corps regional conditions for the new and modified NWPs. The 401 and CZMA agencies will have 60 days from the date of that **Federal Register** notice to make their WQC or CZMA consistency determinations for those NWPs.

Regional Conditioning of the Nationwide Permits

For the proposed new and modified NWPs, the Corps is placing greater emphasis on regional conditioning. Regional conditioning is necessary to ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively.

A number of commenters supported the increased emphasis on regional conditioning for the new and modified NWPs. Some of these commenters recognize the importance of evaluating wetland impacts on a regional and watershed basis. One commenter stated that since hydrologic, geologic, and other environmental characteristics vary across the country, regional conditions are necessary because an inflexible regulatory approach to managing waters of the United States is ineffective. This commenter said that regional conditions provide the flexibility to effectively manage waters of the United States, based on their particular environmental characteristics.

Many commenters expressed opposition to the increased emphasis on regional conditions for the proposed new and modified NWPs. Some commenters recommended that the Corps eliminate regional conditioning from the NWP program. Two commenters said that regional conditions are unnecessary because the NWPs can only authorize activities with minimal adverse effects on the aquatic environment. Another commenter stated that regional conditions are unnecessary

because district engineers can place special conditions on NWP authorizations on a case-by-case basis. One commenter stated that regional conditions are unnecessary because Federal regulations require that general permits must be based on activities, not types of waters. A couple of commenters objected to the approach presented in the July 1, 1998, **Federal Register** notice, because it treats regional conditioning as the rule, not the exception. One commenter stated that regional conditioning should not be required of all districts, because some districts may not need them.

Regional conditioning of the proposed new and modified NWPs is necessary to ensure that these NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment, a requirement of Section 404(e) of the Clean Water Act. Regional conditions are necessary because the national terms and conditions of the NWPs are established to authorize most activities that result in no more than minimal adverse effects on the aquatic environment, individually or cumulatively. For particular regions of the country or specific waterbodies where additional safeguards are necessary to ensure that the NWPs satisfy the statutory requirements for general permits, regional conditions are the appropriate mechanism. Case-specific discretionary authority or special conditions cannot act as surrogates for regional conditions in many cases, especially for those NWP activities that do not require notification to the District Engineer. For example, regional conditions can restrict the use of NWPs in high value waters for those activities that do not require submission of a PCN. Although the proposed NWPs are activity-specific, regional conditions are necessary to protect high value waters to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment. We believe that all districts have high value waters that should be subject to regional conditioning.

A substantial number of commenters asserted that regional conditioning of the NWPs greatly reduces the flexibility of the NWPs, making them more complicated, less useful, and too restrictive. Many of these commenters stated that regional conditioning of the NWPs undermines the intent of Section 404(e) of the Clean Water Act, by making the NWPs more like individual permits. They also said that regional conditions would unnecessarily and substantially increase burdens on the regulated public. A number of

commenters stated that regional conditioning of the NWP offsets any benefits in regulatory streamlining the NWPs are intended to provide. Several commenters stated that regional conditioning of the NWPs will increase the Corps workload, because there will be more projects that cannot qualify for NWP authorization.

Although regional conditions may increase the complexity of the NWPs and reduce their applicability, it is important to remember that NWPs are optional permits, and if the project proponent does not want to comply with all of the terms and conditions of an NWP, including regional conditions, then he or she can apply for authorization through the individual permit process. Regional conditioning of the NWPs is likely to increase the Corps workload, but we believe that such increases are manageable. Division engineers will review the regional conditions proposed by Corps districts and ensure that any regional conditions that are adopted will ensure that the Corps workload will be prioritized to increase protection of the aquatic environment.

A number of commenters objected to the regional conditioning process and wanted to reserve their comments on the proposed new and modified NWPs until they have had the opportunity to review the proposed regional conditions. Many commenters requested that the Corps provide the regulated community an opportunity to comment on the regional conditions after the new and modified NWPs are issued. Several commenters suggested that the Corps allow an additional 60 days to complete the regional conditions to allow full public participation and comment. Some commenters recommended that the Corps publish the regional conditions in the **Federal Register** and provide the public with an additional opportunity to comment on the regional conditions. A number of commenters stated that the process for developing regional conditions is vague and confusing and that clear guidance is needed to assist districts in developing regional conditions. One commenter stated that the national NWP terms and conditions should be established after regional conditioning is completed.

We agree that the public should have another opportunity to comment on the complete NWP package, including the NWPs, general conditions, definitions, and Corps regional conditions. The process for issuing the proposed new and modified NWPs and Corps regional conditions has been changed from the process announced in the October 14, 1998, **Federal Register** notice.

Concurrent with today's **Federal Register** notice, each Corps district will issue a public notice announcing draft regional conditions for a 45-day comment period. Therefore, the public will have 45 days to provide comments on both the draft new and modified NWPs and the draft Corps regional conditions. We have provided Corps divisions and districts with guidance concerning the regional conditioning process to facilitate the development and implementation of regional conditions. We do not agree that the national terms and limits for the NWPs should be established after the Corps regional conditions are finalized because the terms and limits of the NWPs must be first established nationally, so that division engineers can issue Corps regional conditions that account for regional differences in aquatic resource functions and values and provide additional protection for the aquatic environment. Regional conditions make the NWPs more restrictive where necessary to ensure that those NWPs authorize only activities with minimal adverse effects on the aquatic environment.

Several commenters said that division and district engineers should be able to use regional conditioning to make the NWPs less restrictive, as well as more restrictive. Two commenters asserted that the Corps regulations at 33 CFR Part 330.1(d) specifically state that division and district engineers can condition or further restrict NWPs only when they have concerns for the aquatic environment under the Section 404(b)(1) Guidelines or for any other factor of the public interest. Another commenter recommended that the Corps institute a procedure whereby a permit applicant could request Corps headquarters review of a specific regional condition for consistency with general Corps regulatory policy. This commenter expressed concern that the regional conditioning process would create arbitrary inconsistencies in the implementation of the Corps regulatory program between Corps districts. Two commenters stated that Corps regional conditions for the NWPs should not duplicate the states' authority under Sections 401 and 402 of the Clean Water Act. Another commenter expressed concern that the regional conditions would not completely protect waters that need special protection and recommended that the Corps conduct advanced identification of those high value areas. One commenter opposed the principle that regional conditions can restrict the use of NWPs in areas

covered by Special Area Management Plans (SAMPs).

Division and district engineers cannot use regional conditioning to make the NWPs less restrictive. Only the Chief of Engineers can modify an NWP to make it less restrictive, if it is in the national public interest to do so. Such a modification must go through a public notice and comment process. However, if a Corps district believes that regional general permits are necessary for activities not authorized by NWPs, then that district can develop and implement regional general permits to authorize those activities, as long as those regional general permits comply with Section 404(e) of the Clean Water Act. We do not believe that it is necessary to establish a procedure for headquarters review of regional conditions. Division engineers will review proposed regional conditions and approve only those regional conditions that are necessary to ensure that the NWPs authorize only activities with minimal adverse effects on the aquatic environment. We have provided division and district offices with guidance addressing regional conditioning of NWPs. In general, Corps regional conditions should not duplicate State Clean Water Act Section 401 or 402 authorities, but regional conditions can address concerns for the aquatic environment that may also be related to water quality or non-point sources of pollution. The public notice process for regional conditions, especially the process used for the new and modified NWPs, can help the Corps identify specific waterbodies that should be subject to regional conditions. The public had the opportunity, through district public notices, to recommend specific high value waterbodies that should receive additional protection. In some cases, it is appropriate to restrict or prohibit the use of NWPs in areas subject to SAMPs. In areas where SAMPs are conducted, general permits are often developed and issued to provide Section 404 and Section 10 authorization for activities within the area covered by the SAMP. Restricting or prohibiting the use of NWPs within the SAMP area is often necessary to ensure that the SAMP is properly implemented.

Numerous commenters suggested that regional conditions must be consistent between Corps districts within the same state. Another commenter recommended that regional conditions should be consistent between all Corps districts. One commenter observed that regional conditions being developed by districts in initial public notices for the new and modified NWPs are highly variable and emphasized the need for

stronger national terms and conditions. This commenter believes that inconsistencies between Corps districts with regard to regional conditions will be severe and unacceptable. One commenter requested that for companies operating throughout the country, regional conditions must be consistent between districts.

There may be certain regions within a particular state, such as specific high value waterbodies, that warrant regional conditions that are not necessary in other areas of that state. Consistency in regional conditions across the country is contrary to the purpose of the regional conditioning process, which is to consider local differences in aquatic resource functions and values to ensure that the NWP's do not authorize activities with more than minimal adverse effects on the aquatic environment. Companies that work in more than one district will have to comply with the regional conditions established in each district.

The draft regional conditions are currently available for public review on the Internet at the following home pages:

North Atlantic Division

Baltimore District: <http://www.nab.usace.army.mil/permits/regionalconditions.htm>

New England District: <http://www.nae.usace.army.mil/environm/regl.htm>

New York District: <http://www.nan.usace.army.mil/business/buslinks/regulat/index.htm#PNotices>

Norfolk District: <http://www.nao.usace.army.mil/Regulatory/PN/PN.html>

Philadelphia District: <http://www.nap.usace.army.mil/cenap-op/regulatory/regulatory.htm>

South Atlantic Division

Charleston District: <http://www.sac.usace.army.mil/permits>

Jacksonville District: <http://www.saj.usace.army.mil/permit/index.html>

Mobile District: <http://www.sam.usace.army.mil/sam/op/reg/almscat.htm>

Savannah District: <http://www.sas.usace.army.mil/regcond.htm>

Wilmington District: <http://www.saw.usace.army.mil/wetlands/regtour.htm>

Great Lakes and Ohio River Division

Buffalo District: <http://www.lrb.usace.army.mil/orgs/offices/form.htm>

Chicago District: <http://www.usace.army.mil/lrc/co-r/index.htm>

Detroit District: <http://huron.lre.usace.army.mil/regu/dtwhome.html>

Huntington District: <http://www.lrh-opr-nt.orh.usace.army.mil/permits/Nationwide/nation.html>

Louisville District: <http://www.lrl.usace.army.mil/orf/nw/nw.html>

Nashville District: <http://www.orn.usace.army.mil/cof/notices.htm>

Pittsburgh District: <http://www.LRP.usace.army.mil/OR-F/permits.html>

Mississippi Valley Division

Memphis District: http://www.mvm.usace.army.mil/regulatory/public-notices/public_notices.htm

New Orleans District: <http://www.mvn.usace.army.mil/ops/regulatory/Rock Island District: http://www.mvr.usace.army.mil/regulatory/nationwidepermits.htm>

St. Louis District: <http://www.mvs.usace.army.mil/permits/pn.htm>

St. Paul District: <http://www.mvp.usace.army.mil/regulatory/regulatory.html>

Vicksburg District: <http://www.mvk.usace.army.mil/odf/regs/nwpconditions.htm>

Southwestern Division

Fort Worth District: <http://155.84.60.1/current/current.htm>

Galveston District: <http://www.swg.usace.army.mil/news.htm>

Little Rock District: <http://www.swl.usace.army.mil/regulatory/ceal.html>

Tulsa District: <http://www.swt.usace.army.mil/whatishot/whatishot.htm>

Northwestern Division

Kansas City District: <http://www.nwk.usace.army.mil/conops/regulatory.htm>

Omaha District: <http://www.nwo.usace.army.mil/html/op-r/webpg.htm>

Portland District: <http://www.nwp.usace.army.mil/op/g/regulatory.htm>

Seattle District: <http://www.nws.usace.army.mil/reg/reg.htm>

Walla Walla District: <http://www.nww.usace.army.mil/html/offices/op/rf/cond2.htm>

South Pacific Division

Albuquerque District: <http://www.spa.usace.army.mil/reg/localnot.htm>

Los Angeles District: <http://www.spl.usace.army.mil/co/co5.html#reg>

Sacramento District: <http://www.spk.usace.army.mil/cespk-co/regulatory/>

San Francisco District: <http://www.spn.usace.army.mil/regulatory/>

Pacific Ocean Division

Alaska District: <http://www.usace.army.mil/alaska/co/conops1.htm>

Honolulu District: <http://www.pod.usace.army.mil/news/newsrel.html>

Please note that the regional conditions posted on these Internet home pages are the current draft Corps regional conditions, and that there are likely to be changes to the Corps regional conditions based on the comments received in response to district public notices.

Compliance With Section 404(e) of the Clean Water Act

A large number of commenters stated that the proposed NWP's are in violation of Section 404(e) of the Clean Water Act because they believe that the proposed NWP's do not authorize activities that are similar in nature. Section 404(e) stipulates two statutory criteria for general permits, including the NWP's: (1) the activities authorized by a general permit must be similar in nature, and (2) those activities must result in minimal adverse environmental effects, individually or cumulatively. Many of these commenters asserted that the proposed NWP's 39, 42, and 44, as well as additional activities authorized by the proposed modifications of NWP's 12 and 40, violate the provisions of Section 404(e) because they lack precise descriptions of authorized activities and the descriptions for these NWP's included in the July 1, 1998, **Federal Register** notice were too broad to be similar in nature and environmental impact. Many commenters stated that the proposed new and modified NWP's authorize activities with more than minimal adverse effects on the aquatic environment. Some commenters stated that the Corps has not adequately assessed the individual and cumulative adverse environmental effects of the new and modified NWP's in accordance with 33 CFR Part 320 and 40 CFR Part 230.

When considering whether or not an NWP complies with the "similar in nature" criterion of Section 404(e), it is important not to constrain this criterion to a level that makes the NWP program too complex to implement or makes a particular NWP useless because it

would authorize only a small proportion of activities that result in minimal adverse effects on the aquatic environment. Developing NWP's with extremely precise and restrictive language to satisfy the environmental community's definition of the term "similar in nature" would result in a large number of NWP's that would make the NWP program excessively complex and burdensome, without any added protection to the aquatic environment. It appears that most critics of the NWP's believe that activities authorized by an NWP must be identical to each other to satisfy Section 404(e). We believe that the term "similar in nature" is intended to have a more practical definition. The word "similar" does not have the same meaning as the word "identical." We believe that the proposed new and modified NWP's, which are activity-specific, authorize only activities that are similar in nature in the broader, and the more practical, definition of the word "similar." We agree that proposed NWP A may not have satisfied the "similar in nature" requirement of Section 404(e) because of the wide range of authorized activities listed in the text of the proposed NWP. Therefore, we have proposed to modify the description of activities authorized by this NWP (designated as NWP 39) to limit the NWP to the construction of building pads or foundations and attendant features necessary for the operation and use of the building constructed on the pad or foundation. We believe that NWP 39 authorizes only activities that are similar in nature (i.e., the construction of buildings and features necessary for their operation and use) and have minimal adverse effects on the aquatic environment. We believe that each of the other new and modified NWP's proposed in this **Federal Register** notice authorize only activities that are similar in nature.

During the development of these NWP's, the Corps has complied with all applicable laws and regulations, especially 33 CFR Parts 320 through 330 and 40 CFR Part 230. For those new and modified NWP's that are issued, the Corps will prepare Environmental Assessments, Statements of Finding, and, where applicable, Section 404(b)(1) Compliance reviews. These documents will address how these NWP's comply with the public interest review criteria in 33 CFR part 320 and the Section 404(b)(1) impact analysis criteria in 40 CFR part 230. To further ensure that the NWP's authorize only activities with minimal adverse effects on the aquatic environment, the NWP general conditions address specific concerns

relating to the NWP program, such as compliance with the Endangered Species Act and the National Historic Preservation Act. Most NWP's require a Section 401 water quality certification to ensure that the authorized activities meet State or Tribal water quality standards. In coastal areas, most NWP's require a coastal zone consistency determination to comply with Section 307 of the Coastal Zone Management Act. Activities that require a permit pursuant to Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 are not authorized by NWP's.

In accordance with Section 404(e) of the Clean Water Act, the NWP's cannot authorize activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively. For those activities that may result in more than minimal adverse effects on the aquatic environment, division or district engineers will assert discretionary authority (see 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d)), and notify the applicant that the proposed activity is not authorized by NWP. Therefore, the NWP's comply with 40 CFR 230.1(c) and 230.7(a)(3). The factual determination requirements of 40 CFR 230.11 will also be addressed in the decision document for each NWP. These decision documents will include estimates of the discharges anticipated to be authorized by the NWP that are required pursuant to 40 CFR 230.7(b)(3).

General Condition 19 of the NWP's satisfies the requirements of 40 CFR 230.10(d). This general condition requires that permittees avoid and minimize adverse effects on the aquatic environment on-site to the maximum extent practicable. If the adverse effects of the proposed work on the aquatic environment are more than minimal, then the District Engineer will exercise discretionary authority and the project cannot be authorized by NWP, unless it is modified to reduce the adverse effects and comply with all of the requirements of the NWP.

One commenter stated that the Corps increased emphasis on regional conditioning of the NWP's is an acknowledgment that activities authorized by NWP have the potential of resulting in more than minimal adverse effects on the aquatic environment. This commenter objected to the Finding of No Significant Impact (FONSI) issued on June 23, 1998, stating that the FONSI is based on regional conditions which have not yet been proposed. Several commenters objected to the position that the adverse effects on the aquatic environment authorized

by the NWP's will be minimal because they authorize only relatively small losses of waters of the United States and in many cases require compensatory mitigation for those losses. These commenters state that small wetlands often have significant values (e.g., prairie potholes provide waterfowl habitat) and that compensatory mitigation is often ineffective in replacing those values. They also stated that there is insufficient qualitative or quantitative analysis concerning environmental consequences of the new and modified NWP's.

The NWP's authorize activities that, under most circumstances, result in minimal adverse effects on the aquatic environment. The Corps has always acknowledged that some activities that could potentially be authorized by NWP's may have more than minimal adverse effects on the aquatic environment. The notification requirements for NWP's allow district engineers the opportunity to review proposed activities that have the potential for exceeding the minimal adverse effect threshold. The provisions in the NWP regulations, specifically 33 CFR 330.4(e) and 33 CFR 330.5(c) and (d), allow district and division engineers to exercise discretionary authority when specific activities result in more than minimal adverse effects on the aquatic environment and require an individual permit for those activities. Discretionary authority also allows division and district engineers to place conditions on NWP's to ensure that the NWP's authorize only those activities that have minimal adverse effects on the aquatic environment. Division engineers can also place regional conditions on the NWP's. In specific high value waterbodies or wetland types, regional conditions can restrict the use of NWP's in those waters by lowering acreage limits or notification thresholds. Regional conditions can also prohibit the use of NWP's in high value waters. District engineers can place case-specific special conditions on NWP authorizations. The FONSI issued on June 23, 1998, merely reiterates the fact that the regional conditioning process helps ensure that the NWP's authorize only those activities that result in minimal adverse effects on the aquatic environment.

We recognize that there has been, and continues to be, substantial interest among the public regarding the potential environmental effects associated with the implementation of the NWP program. With the last reissuance of the NWP's in December 1996, we reemphasized our commitment to improve data collection

and monitoring efforts associated with the NWP program, and NWP 26 in particular. In many instances, these efforts have already provided critical information on the use of the NWPs, overall acreage impacts, affected resource types, the geographic location of the activities, and the type of mitigation provided. This information is critical in our efforts to make well-informed permitting and policy decisions regarding the continued role of the NWP program and to ensure that the program continues to authorize only those activities with minimal individual and cumulative effects.

Compliance With the National Environmental Policy Act

Many commenters believe that the proposed new and modified NWPs do not comply with the National Environmental Policy Act (NEPA). They disagree with the Corps determination that the NWPs do not constitute a major Federal action that significantly affects the quality of the human environment. These commenters assert that the new and modified NWPs will expand the direct, indirect, and cumulative adverse effects of the NWPs, because these NWPs are applicable in a broader geographic range of waters of the United States than NWP 26.

Many commenters addressed the preliminary environmental assessments (EAs) for the new and modified NWPs and the FONSI issued on June 23, 1998. Several commenters believe that the Corps is making a circular argument when it states that the NWPs do not constitute a major Federal action because, by definition, the NWPs authorize only activities with minimal individual or cumulative adverse effects on the aquatic environment. They believe this conclusion is based on the definition of a general permit, not on data from authorized impacts. They suggest that the Corps consider the loss of wetlands over an extended time period to evaluate the actual adverse effects on the aquatic environment in specific terms, not generalities. One commenter concurred with the Corps determination that the NWPs do not require an Environmental Impact Statement (EIS). One commenter stated that an EIS should be required prior to implementing the new and modified NWPs and the EIS must include an economic analysis of the economic effects of the NWPs. Another commenter said that to comply with NEPA, the Corps must evaluate both wetlands and upland impacts for activities authorized by NWPs.

NEPA requires Federal agencies to prepare an EIS only for major Federal

actions that have a significant impact on the quality of the human environment. Even though we have committed to prepare a Programmatic Environmental Impact Statement (PEIS) for the NWP program, we continue to maintain our position that the NWP program does not constitute a major Federal action significantly affecting the human environment. Therefore, the preparation of an EIS is not required by NEPA. The NWPs authorize only those activities that have minimal adverse environmental effects on the aquatic environment, individually or cumulatively, which is a much lower threshold than the threshold for requiring an EIS. This is not a circular argument. To ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively, there are several safeguards in the NWP program: (1) PCN requirements to allow district engineers to review certain proposed NWP activities on a case-by-case basis; (2) compensatory mitigation requirements for most activities that require a PCN; (3) the ability to impose case-specific conditions on an NWP authorization to protect the aquatic environment; (4) the ability to impose regional conditions on an NWP to protect high value waters; (5) the requirement for water quality certification for activities involving a discharge of dredged or fill material into waters of the United States; (6) the requirement for Coastal Zone Management Act consistency determination in coastal areas; and (7) provisions for discretionary authority to require an individual permit review if the proposed impacts are more than minimal.

The FONSI was issued on June 23, 1998. Copies of the FONSI are available at the office of the Chief of Engineers, at each District office, and on the Corps regulatory home page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. The EAs for each of the new and modified NWPs will be available on the Corps regulatory home page when the issuance of these NWPs is announced in a future **Federal Register** notice. When regional conditions are added to an NWP, a supplemental decision document containing local analyses will be issued by the Division Engineer. The supplemental decision documents for a district's regional conditions will be available at that district.

For the Corps regulatory program, including the NWP program, the procedures for complying with NEPA are contained in 33 CFR Part 325, Appendix B. The scope of analysis for

NEPA compliance is thoroughly discussed in Appendix B, including the factors to be considered when determining the extent of Federal control and responsibility for a particular project. In most cases, upland impacts are not part of Federal control and responsibility, and should not be included in a general analysis of NEPA compliance for the NWP program.

Many commenters stated that, while they support the Corps intent to prepare a PEIS for the NWP program, the PEIS should be completed prior to the issuance of the new and modified NWPs. Several commenters remarked that the PEIS should have been completed prior to this reissuance of the NWPs in 1996. Some commenters stated that the PEIS should include a comprehensive and accurate accounting of the cumulative impacts authorized by the NWPs in the past. One commenter recommended that the Corps allow full public participation in the preparation of the PEIS through regional meetings. This commenter also suggested that the PEIS address the following alternatives: no action, reduction in scope of authorized activities, reduction in acreage impact limits, and alternative programmatic approaches. One commenter agreed that a PEIS is not required and stated that while the Corps is not legally prevented from producing a PEIS, even if it is not required, the PEIS could have significant effects on the Corps workload and the Corps should not devote resources to the preparation of the PEIS at the expense of its other activities.

We have committed to demonstrating that the NWP program authorizes only those activities with minimal individual and cumulative environmental effects. Consistent with this commitment, the Corps will prepare, through the Institute for Water Resources, a PEIS for the entire NWP program. While a PEIS is not required for the same reasons that an EIS is not required, the PEIS will provide the Corps with a comprehensive mechanism to review the effects of the NWP program on the human environment. The PEIS will be conducted with the participation of other Federal agencies, States, Tribes, and the public. The Corps is scheduled to initiate the PEIS by mid-1999 and complete the PEIS by December 2000. Therefore, the PEIS should be completed prior to the next scheduled reissuance of the NWPs in December 2001. Since the PEIS is not required, we will not delay the issuance of the new and modified NWPs. The PEIS will fully comply with NEPA requirements, including alternatives analyses. There have been meetings to provide other

Federal agencies, states, Tribes, and the public with opportunities to participate in the scoping of the PEIS. These scoping meetings were announced in a **Federal Register** notice published on March 22, 1999 (64 FR 13782).

Some commenters said that the preliminary EAs do not comply with NEPA because they do not adequately address alternatives that are necessary to support the final decision. They believe that failure to consider a "no action" alternative is inconsistent with NEPA and that an alternatives analysis in the EA cannot be replaced with a discussion of the case-specific flexibility provided by the NWP program. Another commenter stated that if the EAs are properly prepared, they would not support the FONSI determination.

In compliance with NEPA, environmental documentation will be prepared for each new and modified NWP. Each document will include an EA, a FONSI, and, where relevant, a preliminary Section 404(b)(1) Guidelines compliance review. Each EA will contain an alternatives analysis for the NWP, including a discussion of the "no action" alternative. The alternatives analysis will also consider national modification alternatives, regional modification alternatives, and case-specific on-site alternatives for the NWP. After the issuance of the new and modified NWPs, copies of these documents will be available for inspection at the office of the Chief of Engineers, at each Corps district office, and at the Corps regulatory home page at the Internet address cited at the beginning of this **Federal Register** notice.

Several commenters stated that the preliminary EAs for the proposed new and modified NWPs are inadequate because they fail to provide an ecological rationale for the proposed acreage limits. These commenters believe that the assessment of individual and cumulative adverse effects relies entirely on conditions that address secondary impacts, future regional conditions, and the discretion of the District Engineer in the PCN process. Another commenter recommended that the Corps revise the EAs once the regional conditions are developed and suggested that the Corps place the revised EAs, with the regional conditions, on public notice in the **Federal Register** to provide an opportunity for public comment.

Where appropriate, each EA will generally consider different acreage limits for each NWP. Acreage limits for each NWP are established to allow the NWPs to authorize most activities that result in minimal adverse effects on the

aquatic environment, individually or cumulatively. The minimal adverse effects determination is based on general consideration of the effects of the authorized activities on the physical, chemical, and biological characteristics of the aquatic environment, as well as human use characteristics. Division engineers can regionally condition an NWP to decrease the acreage limit established nationally for that NWP, if such a regional condition is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. When division engineers approve regional conditions for an NWP, they will issue a decision document that will supplement the national EA for that NWP. On a case-by-case basis, it is the responsibility of district engineers to assess and monitor the adverse effects on the aquatic environment that result from activities authorized by NWPs. District engineers review PCNs to assess the foreseeable adverse effects caused by the authorized work. The final EAs for the new and modified NWPs will not be subject to public comment, since they are final decision documents.

Scope of the New Nationwide Permits

In the July 1, 1998, **Federal Register** notice, we requested comments on the scope of applicable waters for the new and modified NWPs. In that **Federal Register** notice, we listed five categories of applicable waters for the proposed NWPs. The categories of waters included: (1) all waters of the United States; (2) non-tidal waters; (3) non-tidal waters, excluding non-tidal wetlands contiguous to tidal waters; (4) non-Section 10 waters; and (5) non-Section 10 waters, excluding wetlands contiguous to Section 10 waters.

Most of the commenters objected to the proposed NWPs because they authorize activities in most non-tidal waters of the United States, including non-tidal wetlands adjacent, but not contiguous, to tidal waters. On the other hand, some commenters supported the proposed NWPs because the distinction between non-tidal waters and headwaters and isolated waters was dropped from the NWP program. NWP 26 authorizes activities only in isolated waters and headwaters. A number of commenters expressed concern that the increased scope of applicable waters for the new NWPs provides less protection to the aquatic environment because many of the waters subject to the new NWPs are important for a variety of fish and wildlife and provide important functions and values such as flood control and improvement of water

quality. One of these commenters stated that the increased scope of waters would harm the ecological integrity of watersheds. One commenter remarked that the scope of waters for the new NWPs implies that non-tidal waters are less important than tidal waters.

To increase protection of the aquatic environment, we have modified the applicable waters for the some of the proposed new and modified NWPs (i.e., NWPs 39, 40, 41, 42, and 43) to prohibit the use of these NWPs in non-tidal wetlands adjacent to tidal waters. With the proposed NWPs, the Corps is increasing protection of open and flowing waters, and not focusing only on wetlands, especially low-value wetlands. This approach will enhance protection of the aquatic environment. The proposed NWPs were developed and conditioned to better control and limit adverse effects on the aquatic environment. We are proposing to modify two NWP general conditions to provide greater protection for water quality and maintenance of water flows (General Conditions 9 and 21, respectively). We are also proposing three new NWP general conditions to protect the aquatic environment (General Conditions 25, 26, and 27) by restricting the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains. The proposed general conditions are discussed elsewhere in this **Federal Register** notice. In addition, Corps districts and divisions will regionally condition these NWPs to ensure that they authorize only activities with minimal adverse effects on the aquatic environment.

NWPs 39, 41, 42, and 43 do not authorize activities in non-tidal wetlands adjacent to tidal waters. High value isolated waters identified by districts will be protected through the regional conditioning of the NWPs. Case-specific special conditions and discretionary authority will also be used to protect high value waters when district engineers review PCNs.

Many commenters stated that the five categories of waters of the United States applicable to the new NWPs make the NWP program too complex. One commenter remarked that identifying these waters would not result in a workload savings to the Corps because it will require additional field review. One commenter recommended that the Corps reduce the number of applicable waters from five to three, specifically "all waters," "Section 10 waters," and "non-tidal waters." Another commenter believes that these categories are arbitrary and requested that the Corps

provide justification for these categories of waters. A few commenters asked why "adjacent waters," as used in the context of NWP 26, was dropped from the NWP program. One commenter suggested that NWPs 39, 41, 42, 43, and 44 should be modified to authorize activities only in isolated waters and headwaters.

We recognize that the five categories of waters discussed in the July 1, 1998, **Federal Register** notice can be considered by some members of the regulated public as unnecessarily complex, so we have simplified the applicable waters for the new NWPs. Most of the new NWPs authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The applicable waters for each proposed new and modified NWP are discussed in detail in the preamble discussions of those NWPs.

One commenter objected to the focus on contiguous waters and stated that subsurface connections between waters of the United States are as important as surface connections. Two commenters requested that the Corps specify that for non-contiguous, isolated waters, an interstate or foreign commerce connection must be established for these areas to be considered waters of the United States. One commenter objected to portions of the July 1, 1998, **Federal Register** notice that stated that district engineers can exercise discretionary authority when areas with "significant social or ecological functions and values" may be adversely affected by the work, because the commenter believes that the Clean Water Act does not provide regulatory authority for areas with significant social values. Another commenter objected to the use of the term "ecological functions," stating that it is not a term used to define the scope of authority.

We recognize that subsurface connections between waters of the United States are important, but the Section 404 program focuses on surface waters. It is not necessary for the Corps to specify that isolated waters require an interstate or foreign commerce connection for these waters to be considered waters of the United States, because that requirement can be found in 33 CFR Part 328. Discretionary authority can be exercised by division and district engineers where there are sufficient concerns for the aquatic environment under the Section 404(b)(1) guidelines or any other factor of the public interest. Public interest factors include consideration of waters

with "significant social or ecological functions and values."

A couple of commenters stated that the classification of perennial, intermittent, and ephemeral streams will establish a ranking system, implying that perennial streams are more valuable than ephemeral streams. These commenters believe that the majority of streams in the northwestern, northeastern, and southern United States will receive more protection than those in the western and southwestern United States.

We are classifying streams as perennial, intermittent, and ephemeral for the purposes of the NWPs to evaluate or restrict adverse effects to flowing waters more effectively. For example, in NWP 43 we are proposing to prohibit the construction of new stormwater management facilities in perennial streams. Damming perennial streams to construct stormwater management ponds often has more than minimal adverse effects on the aquatic environment, particularly for aquatic organisms such as fish and invertebrates. Dams in perennial streams may block fish passage to spawning areas and disrupt food webs in streams, reducing the productivity of streams. In many areas, it is more effective to construct stormwater management ponds in ephemeral and low-value intermittent streams, because these facilities, if properly designed, constructed, and maintained, will substantially reduce adverse effects of nearby development on local water quality and water flows. In areas where ephemeral streams are valuable aquatic resources, division and district engineers can regionally condition the NWPs to restrict their use in ephemeral streams or require PCNs for activities in ephemeral streams.

Indexing of the Nationwide Permits To Determine Acreage Limits

In the July 1, 1998, **Federal Register** notice, we requested comments on the use of indexing to determine acreage limits for NWPs 39 and 40, as well as the proposed NWP B for master planned developments. Most of the commenters who addressed the use of indexing to determine acreage limits for certain NWPs were opposed to the indexing schemes proposed in the July 1, 1998, **Federal Register** notice. A majority of commenters stated that the proposed indexes were too confusing, not scientifically based, burdensome on the regulated public, and would result in a significant workload increase for the Corps. These commenters believe that indexing acreage limits makes the NWPs less efficient and increases the amount

of time spent reviewing activities that have minimal adverse effects on the aquatic environment. Most of these commenters requested that the Corps continue to use simple acreage limits for the NWPs. Some commenters recommended basing the indexed acreage limit on a percentage of parcel size, whereas other commenters suggested basing the indexed acreage limit on a percentage of the total wetland acreage within the parcel, not the total size of the parcel.

Some commenters believe the proposed indexes for these NWPs were too restrictive and that both the maximum acreage loss and PCN thresholds under the NWP should be higher. Other commenters said that the proposed indexes and PCN thresholds would authorize activities with more than minimal adverse effects on the aquatic environment and recommended reducing the acreage limits and PCN thresholds. Several commenters believe that using indexing to determine acreage limits will allow NWPs to authorize activities that result in more than minimal cumulative adverse effects by not addressing avoidance and minimization. A number of commenters were confused as to how the proposed indexes would be interpreted or utilized, particularly where there was overlap between parcel size ranges and acreage limits. For example, the proposed acreage limit index for NWP A had an acreage limit of $\frac{1}{2}$ acre for parcel sizes of 5 to 10 acres and an acreage limit of 1 acre for parcel sizes of 10 to 15 acres. These commenters were uncertain as to whether the acreage limit for a project constructed on a 10-acre parcel would be $\frac{1}{2}$ acre or 1 acre.

We believe that indexing acreage limits based on project size or project area is necessary for certain NWPs (*i.e.*, NWPs 39 and 40) to ensure that those NWPs authorize only activities that have minimal adverse effects on the aquatic environment. Instead of using the indexing schemes proposed in the July 1, 1998, **Federal Register** notice, we are proposing indexes based on simple algebraic formulas, using a percentage of project area or farm tract size. The proposed indexed acreage limit for NWP 39 has a minimum acreage limit of $\frac{1}{4}$ acre for a single and complete project, with the indexed acreage limit increasing by 2% of the project area to a maximum acreage limit of 3 acres. For NWP 40 activities in playas, prairie potholes, and vernal pools, we are proposing a similar indexing formula, with a base acreage limit of $\frac{1}{10}$ acre and a different percentage of farm tract size (*i.e.*, 1% of farm tract size). For NWP 40 activities in other types of non-tidal

wetlands to increase agricultural production, we are proposing a simple acreage limit of 2 acres, since the average farm tract size in the United States is 275 acres, which means that most agricultural producers would qualify for the maximum acreage limit even if an indexed acreage limit would be used.

The algebraic indexing scheme will be easier to use and less confusing than the indexes proposed in July 1, 1998, **Federal Register** notice. Indexing based on the percentage of project size will avoid the confusion resulting from overlap of parcel size ranges. For example, in the indexing scheme proposed for NWP A in the July 1, 1998, **Federal Register** notice (see 63 FR 36067), a 15-acre parcel would be subject to either a 1 or 2 acre limit. The algebraic index avoids this overlap in acreage limits. We believe that the indexes used for NWPs 39 and 40 will allow the authorization of most activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. Division engineers can regionally condition NWP 39 to make the indexed acreage limit more restrictive, either by reducing the minimum acreage limit, percentage of project area or farm tract size, or maximum acreage limit. For example, NWP 39 can be regionally conditioned to reduce the minimum acreage limit from $\frac{1}{4}$ acre to $\frac{1}{10}$ acre or the percentage of project area from 2% to 1%. However, paragraph (a) of NWP 40 cannot be regionally conditioned by division engineers, to ensure consistent implementation of this part of NWP 40 in cooperation with NRCS throughout the country. An activity that exceeds the indexed acreage limit will require authorization by another NWP, a regional general permit, or an individual permit. The use of an indexed acreage limit does not preclude project proponents from complying with General Condition 19, which requires on-site avoidance and minimization of activities in waters of the United States to the maximum extent practicable. If the District Engineer determines that the proposed work will result in more than minimal adverse effects on the aquatic environment, then discretionary authority will be exercised and the applicant will be notified that another form of Corps authorization, such as an individual permit or regional general permit, is required.

Another source of confusion for NWP applicants cited by commenters was the application of PCN thresholds with an indexed acreage limit. For example, the proposed index for NWP 39 had an acreage limit of $\frac{1}{4}$ acre for activities on

parcels less than five acres in size. The proposed PCN threshold for this NWP was $\frac{1}{3}$ acre. Some commenters thought that this implied that losses of greater than $\frac{1}{4}$ acre of waters of the United States would require notification to the Corps, but this requirement was not specifically stated in the NWP.

For NWP 39, the PCN threshold has been changed to $\frac{1}{4}$ acre. Since this threshold is the same as the minimum acreage limit of $\frac{1}{4}$ acre in the indexed acreage limit, the PCN requirements for these NWPs should not be confusing. District engineers will not receive PCNs for agricultural activities authorized only by paragraph (a) of NWP 40. Instead, they will receive postconstruction reports from landowners that describe the authorized work.

Workload Implications of the New NWPs

A number of commenters stated that the complexity of the proposed NWPs will increase the Corps workload for the NWP program. Some of these commenters said that the current staffing level of the Corps is inadequate to implement the proposed new and modified NWPs. One commenter stated that utilization of the NWPs as a tool to prioritize workload is an abdication of the Corps responsibility. This commenter said that the Corps regulatory program can be made more efficient through other means, such as improved technology, the use of private delineators, permit fees, and increased coordination.

For many years, general permits, including NWPs, have been used by the Corps to manage its workload by authorizing activities with minimal adverse effects on the aquatic environment that would otherwise be subject to the more resource-intensive individual permit process. The Corps does not have the resources to review each activity that requires a Section 404 and/or Section 10 permit through the individual permit process. Requiring individual permits for all these activities would also create unnecessary burdens on the regulated public. Most activities authorized by the Corps regulatory program are authorized by general permits. General permits, including NWPs, authorize activities that would usually be authorized through the individual permit process with little or no change in the scope of work. It is inefficient to require an individual permit for activities that have minimal adverse effects on the aquatic environment that the Corps could authorize more effectively through the general permit process. General permits

also benefit the aquatic environment because they provide incentives for landowners and developers to design their projects to reduce adverse effects on the aquatic environment to qualify for the expedited permit process provided by general permits.

The scope of applicable waters for the proposed NWPs and the proposed new NWP general conditions, especially General Condition 27, will cause substantial increases in the Corps workload by requiring individual permits for many activities in designated critical resource waters, impaired waters, and waters of the United States within the 100-year floodplain. The proposed prohibition against using NWPs to authorize certain activities resulting in permanent, above-grade fills in waters of the United States within the 100-year floodplain is expected to result in two to three thousand more individual permits per year added to the Corps workload.

The increase in the Corps workload caused by the proposed NWP general and regional conditions will require that most Corps districts reprioritize their activities. Corps districts will focus their efforts on those actions that provide the most value added to the environment and the public. Inevitably, the substantial increase in workload will result in an increase in permit evaluation time for most permit reviews. At this point, we cannot quantify these impacts.

Preconstruction Notification

A few commenters recommended that the Corps extend the review period for preconstruction notifications (PCNs) from 30 days to 45 or 60 days, due to the increased complexity of the new and modified NWPs. One commenter expressed support for the 30-day review period for PCNs. Several commenters believe that the PCN thresholds and information requirements are confusing and that the PCN thresholds should be lower for all activities, such as $\frac{1}{4}$ acre of waters or 100 linear feet of stream bed.

We recognize that the proposed NWPs are more complex than NWP 26 and that a longer PCN period is necessary to effectively review notifications. We are proposing to modify the preconstruction notification process for the NWPs to provide more time for district engineers to review PCNs. District engineers will have 30 days from the date of receipt of a PCN to determine if it is complete. If the PCN is not complete, the District Engineer can make only one request for additional information from the applicant. This request must be made during the initial 30-day period. District

engineers cannot make additional requests for more information to evaluate the PCN. If the applicant has not provided all of the requested information to the District Engineer, then the PCN is not considered complete and the PCN review process will not start until the applicant has provided all of the requested information to the District Engineer. Upon receipt of a complete PCN, the District Engineer has 45 days to determine if the proposed work qualifies for NWP authorization, with or without special conditions, or exercise discretionary authority to require an individual permit. If the District Engineer does not notify the applicant of the outcome of the PCN review prior to the end of the 45-day period, then the proposed work is authorized by NWP and the permittee can begin work provided all of the requisite State and local authorizations, such as WQC, have been obtained. We are proposing to modify General Condition 13 in accordance with the proposed changes to the notification process discussed above.

The Corps has limited the amount of information required to be submitted with a PCN to the minimum necessary to effectively evaluate the potential adverse effects of the proposed work on the aquatic environment and determine if the project complies with the terms and conditions of the NWPs. By providing the required information when the PCN is first submitted to the Corps, the applicant will minimize delays in processing. The Corps has also changed the PCN threshold for many of the proposed NWPs from $\frac{1}{3}$ acre to $\frac{1}{4}$ acre to provide more consistency. The proposed PCN thresholds for stream bed impacts are similar to the PCN thresholds proposed in the July 1, 1998, **Federal Register** notice.

Two commenters recommended that PCNs should be required for all activities authorized by the new NWPs. These commenters stated that 15 days is an inadequate length of time for agency technical review of site conditions, mitigation plans, and monitoring plans for activities authorized by these NWPs. These commenters also believe that the lack of agency coordination for PCNs violates the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and the Fish and Wildlife Coordination Act (FWCA). Another commenter stated that the PCN process is illegal.

Requiring PCNs for all activities authorized by NWPs is unnecessary and would substantially reduce the effectiveness of the NWPs. PCN thresholds are established so that only

activities that could potentially result in more than minimal adverse effects on the aquatic environment require notification to the Corps. In addition, the Corps does not have the resources to review PCNs for every activity authorized by NWPs. We are proposing to modify General Condition 13 to provide more time for Federal and State resource agencies to review PCNs. These agencies will have 10 calendar days to notify the District Engineer that they intend to provide substantive, site-specific comments. If these agencies provide such notification, the District Engineer will wait an additional 15 calendar days before making a decision on the PCN. Twenty-five days is an adequate period of time for the Federal and State resource agencies to review PCNs. The intent of agency coordination is to obtain site-specific, substantive comments from these agencies within their area of expertise. Detailed mitigation and monitoring plans are not required for the PCN. The applicant need only propose compensatory mitigation that will offset losses of waters of the United States. The Federal and State resource agencies can comment on the appropriateness of the proposed compensatory mitigation. The District Engineer will determine if the proposed compensatory mitigation is appropriate and incorporate the requirements for compensatory mitigation, including detailed plans and monitoring requirements, into the NWP authorization as special conditions.

The PCN process does not violate ESA, NEPA, or FWCA. General Condition 11 ensures that activities authorized by NWPs comply with ESA. There is no provision in NEPA requiring the Corps to coordinate activities authorized by general permits with other Federal, State, or local agencies. The NWP issuance process satisfies the coordination requirements of FWCA. The PCN process is not illegal; it is merely a mechanism to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Two commenters suggested that the avoidance and minimization statement required for NWPs 39 and 43 should be required for all NWP activities that require a PCN. Another commenter recommended that the minimization and avoidance statement should be limited to one page.

We disagree that the avoidance and minimization statement is necessary for all NWP activities that require a PCN. General condition 19 requires that permittees avoid and minimize impacts to waters of the United States on-site to

the maximum extent practicable. In addition, many activities authorized by NWP must occur in a certain location. For example, repair and maintenance activities authorized by NWP 3 must be in the same location as the existing structure or fill. Bank stabilization activities authorized by NWP 13 must occur at the location of the bank. The statement required for NWPs 39 and 43 is intended to encourage the applicant to consider ways to avoid and minimize impacts to waters of the United States during project planning. It also provides avoidance and minimization information to Corps personnel with the PCN, instead of requiring the District Engineer to ask the applicant if additional avoidance and minimization can be achieved. The avoidance and minimization statement will allow more expeditious review of the PCN.

One commenter stated that a delineation of special aquatic sites should be required for every activity that requires a PCN. Another commenter recommended establishing a notification process for projects that include development on floodplains, so that State and local floodplain management agencies can review the proposed work.

We disagree that a delineation of special aquatic sites is necessary for every activity requiring a PCN. General condition 13, paragraph (b)(4), lists the NWPs that require submission of a delineation of special aquatic sites with the PCN. It is not practical for the Corps to establish a notification process for projects that occur in floodplains. In many parts of the country, there are floodplains that are not waters of the United States. Development activities in floodplains that do not involve discharges of dredged or fill material into jurisdictional wetlands or other waters of the United States do not require a Section 404 permit, even though a Corps permit may be required to cross waters of the United States to provide access to the upland development. Many State and/or local governments currently have programs that address construction in floodplains. Issuance of an NWP authorization for an activity within a floodplain does not preclude the State or local floodplain management agency from denying its authorization. If the State or local regulatory agency does not authorize the proposed work, then the project proponent cannot do the work even though the Corps may have determined that it qualifies for authorization under the NWP program.

In response to the July 1, 1998, **Federal Register** notice, the National Park Service (NPS) requested that they

receive full opportunity to comment on all proposed NWP activities that may impact NPS resources. NPS also requested that they be able to request elevation of specific projects to require review under the individual permit process. Although the Department of the Interior, through the U.S. Fish and Wildlife Service (FWS), has the opportunity to review PCNs that require agency coordination, NPS believes that the 5 day comment period does not provide enough time to allow FWS to consult with NPS.

We do not agree that it is necessary to consult with NPS on every NWP activity. If NPS has specific concerns, they should be addressed at the district level, either through coordination agreements between the District Engineer and the local NPS office or through the regional conditioning process. The proposed modification of the PCN process would allow district engineers to provide up to 25 calendar days for agency comment on a specific NWP activity that requires agency coordination. We believe that this is ample time for FWS to coordinate with NPS.

One commenter recommended that the Corps post PCNs on district Internet home pages to allow the public to provide comments and better track cumulative adverse effects. Another commenter requested that the Corps coordinate with the appropriate agency prior to issuing NWP authorizations in Tribal trust lands to determine if treaty reserved resources would be adversely affected by the work.

The purpose of the PCN process is to provide the Corps with an opportunity to determine if a proposed activity complies with the terms and conditions of the NWPs and results in minimal adverse effects on the aquatic environment, individually or cumulatively. Posting PCNs on the Internet would add no value to the Corps review of the PCN. Cumulative adverse effects on the aquatic environment will continue to be tracked by Corps districts. Corps districts can regionally condition the NWPs to require coordination for activities that may adversely affect treaty reserved resources in Tribal trust lands.

Compensatory Mitigation

A large number of commenters specifically addressed the compensatory mitigation requirements of the proposed new and modified NWPs. A few commenters stated that the proposed provisions discourage compensatory mitigation, because the requirements are too complex and burdensome. Other commenters assert that the

compensatory mitigation requirements discussed in the July 1, 1998, **Federal Register** notice are not specific enough. Many commenters provided recommendations concerning the size and types of losses authorized by the NWPs for which compensatory mitigation is appropriate. These recommendations included requiring compensatory for: (1) All activities authorized NWPs, (2) activities that require submittal of a PCN, (3) losses of greater than $\frac{1}{3}$ acre of waters of the United States, or (4) losses of greater than 1 acre of waters of the United States. One commenter suggested that compensatory mitigation should also be required for all impacts to non-wetland aquatic resources. Several commenters stated that the Corps should not require compensatory mitigation for wetlands losses because other State and local regulatory agencies already have such requirements.

We acknowledge that the discussions of compensatory mitigation requirements in the July 1, 1998, **Federal Register** notice contained some inconsistencies. Therefore, we will clarify these requirements in general terms, but permittees must recognize that specific compensatory mitigation requirements for particular projects are established by the District Engineer. Compensatory mitigation will normally be required for NWP activities that require submission of a PCN (e.g., losses of greater than $\frac{1}{4}$ acre of waters of the United States), and in all cases where compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. The District Engineer may determine that compensatory mitigation is not necessary for a particular project because the proposed work will result in only minimal adverse effects on the aquatic environment. Activities that do not require notification are presumed to result in minimal adverse effects and would not require compensatory mitigation to bring the adverse effects to the minimal level. District and division engineers can regionally condition an NWP to lower the notification threshold and determine, on case-by-case basis, if compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Although many State and local agencies may require compensatory mitigation for losses of wetlands, we can require compensatory mitigation for losses of other waters of the United States. If the compensatory mitigation requirements of a State or local agency for a particular project adequately

address the Corps concerns or requirements, then that compensatory mitigation can be used to satisfy the Corps compensatory mitigation requirements. However, some State and local governments may not have adequate compensatory mitigation provisions to ensure that activities authorized by NWPs will result in minimal adverse effects on the aquatic environment. Therefore, the Corps can impose its own compensatory mitigation requirements.

Many commenters expressed opposition to the use of compensatory mitigation to offset losses of waters of the United States that result from activities authorized by NWPs. They believe that compensatory mitigation encourages off-site, out-of-kind compensation for losses of waters of the United States. Another objection raised by these commenters is that some wetland types are not easily created. A number of commenters cited studies that evaluated compensatory mitigation projects and found them to be unsuccessful or only partially successful. One commenter stated that only restoration and creation should be used to calculate net gains in wetlands. One commenter recommended limiting preservation only to exceptional quality or unique wetlands.

Compensatory mitigation is often necessary to offset the loss of waters of the United States and ensure that an activity authorized by NWP will result in minimal adverse effects on the aquatic environment. The NWP regulations at 33 CFR Part 330.1(e)(3) allow permittees to provide compensatory mitigation to reduce the adverse effects of the proposed work to the minimal level. The functions and values provided by waters of the United States that are lost due to authorized activities can be replaced by carefully planned and constructed restoration, enhancement, and creation of aquatic habitats. Compensatory mitigation can also protect and enhance important aquatic resource functions and values through the establishment and maintenance of vegetated buffers adjacent to waters of the United States and, in exceptional circumstances, the preservation of high value aquatic habitats. Without compensatory mitigation, the Corps regulatory program would not be able to satisfy a principal goal of the Clean Water Act, which is the restoration and maintenance of the physical, chemical, and biological integrity of the Nation's waters.

Compensatory mitigation requirements should be based on what is best for the aquatic environment, not

inflexible requirements for in-kind and on-site compensatory mitigation that may not successfully replace lost functions and values of aquatic habitats. The primary goal of compensatory mitigation is to replace the functions and values of waters of the United States that are lost due to activities authorized by NWP. It is essential that compensatory mitigation projects that restore, enhance, or create aquatic habitats have a high probability of success. Much of the failure of past compensatory mitigation projects is due to poor site selection, planning, and implementation. On-site compensatory mitigation projects may fail because site conditions, such as local hydrology, are usually substantially changed by the authorized activity. For example, once a residential subdivision is constructed, the on-site hydrology may be altered to the extent that the site cannot support a restored or created wetland. In such cases, it may be better for the aquatic environment to conduct the compensatory mitigation project off-site, in a location with better chances for success within the watershed of the authorized work.

When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requiring vegetated buffers to open waters, streams, and wetlands. Wetland restoration, enhancement, creation, and in exceptional circumstances, preservation are not the only compensatory mitigation activities that can be required for an NWP authorization. Stream restoration and enhancement can also provide compensatory mitigation for losses resulting from activities authorized by NWPs. Upland buffers can be considered as out-of-kind compensatory mitigation because they protect local water quality and aquatic habitat. Vegetated buffers reduce adverse effects to water quality caused by adjacent land use. For example, forested riparian buffers provide shade to streams, supporting cold water fisheries. We cannot require compensatory mitigation for upland impacts, but we can require, as compensatory mitigation, upland vegetated buffers that protect water quality and aquatic habitat. It is important to note that the NWPs are optional permits, and if the project proponent does not want to establish and maintain vegetated buffers adjacent to waters of the United States to qualify for an NWP authorization, then he or she can apply for authorization through the individual permit process. The establishment or maintenance of a

vegetated buffer adjacent to waters of the United States can be an important part of the compensatory mitigation required for a Corps permit. District engineers should adjust the amount of "replacement acreage" required for compensatory mitigation by an amount that recognizes the value of the vegetated buffer to the aquatic environment.

We recognize that certain wetland types are not easily restored or created. Past failures to replace certain types of wetlands are not sufficient justification to stop all efforts to replace wetlands lost through the Section 404 program. Some types of wetlands are easily restored or created, although they may take several years to achieve functional equivalence compared to natural wetlands. Preservation is also an important mechanism to protect remaining high value wetland types, particularly those that cannot be easily restored or created. Careful site selection, planning, and construction are essential to achieve greater success for compensatory mitigation projects.

The ability of the Corps to review and monitor compensatory mitigation projects required for NWP authorizations is dependent upon workload and available resources. Increased use of mitigation banks and appropriate in lieu fee programs may make monitoring efforts more manageable, because those efforts can be focused on a smaller number of large sites instead of a large number of small individual mitigation projects. Mitigation banks and appropriate in lieu fee programs may provide better compensatory mitigation because they are often better planned, constructed, and maintained. The goal of compensatory mitigation is to offset losses of waters of the United States authorized by the Corps regulatory program. Because the Corps program causes the avoidance of most high value wetlands, most permitted impacts are to moderate or low value wetlands.

We also received numerous comments concerning the location and types of compensatory mitigation that should be acceptable for the NWP program. Most commenters expressed a preference for restoration, and some commenters oppose the use of enhancement or preservation of aquatic resources to provide compensatory mitigation. Some commenters oppose the use of out-of-kind compensatory mitigation to offset losses of waters of the United States. Several commenters recommended that the Corps require compensatory mitigation at specific ratios, ranging from 1:1 to 5:1. Many commenters stated that compensatory mitigation

projects should be confined to the watershed where the losses resulting from the authorized activity occurred. Most commenters recommended that the NWPs should not express a sequencing preference for on-site mitigation, mitigation banks, or in lieu fee programs. One commenter stated that the NWPs should have a general condition establishing compensatory mitigation performance criteria, to specify basic requirements.

We recognize that restoration is the type of compensatory mitigation with the greatest probability of success and encourage its use wherever possible. Enhancement of aquatic resources improves the functions and values of low-quality waterbodies, but should not be used in high value waters. As stated in the July 1, 1998, **Federal Register** notice, preservation of aquatic resources is estimated to comprise less than 5% of the compensatory mitigation required by the Corps, but it is an important mechanism for protecting high value wetlands and waterbodies.

Out-of-kind compensatory mitigation should not be prohibited because it can provide substantial benefits for the aquatic environment. An important form of out-of-kind compensatory mitigation is the establishment and maintenance of upland vegetated buffers adjacent to open or flowing waters or wetlands. Upland vegetated buffers help protect and enhance the water quality and aquatic habitat features of waters of the United States.

Specific compensatory mitigation requirements, such as replacement ratios, are determined by district engineers on a case-by-case basis. For the NWPs, district engineers determine what compensatory mitigation is necessary to ensure that the adverse effects of the proposed work on the aquatic environment are minimal. The Corps can require compensatory mitigation in excess of a 1:1 ratio of impact acreage to compensatory mitigation acreage in order to adequately replace the lost aquatic resource functions and values. The Corps can also accept out-of-kind compensatory mitigation, if it provides benefits to the aquatic environment. We believe that it is inappropriate, due to the differences in aquatic resource functions and values across the country, to establish national requirements for compensatory mitigation.

One commenter stated that the compensatory mitigation data cited by the Corps in the July 1, 1998, **Federal Register** notice was misleading because many NWP activities do not require reporting to the Corps. Several commenters requested that the Corps

provide accurate data on losses of waters of the United States to allow the public to consider compensatory mitigation requirements and that this data should specify the proportion of compensatory mitigation that is achieved through enhancement of aquatic resources. A number of commenters requested that the Corps modify its data collection efforts to monitor the amount of compensatory mitigation that is accomplished through restoration, enhancement, creation, and preservation, as well as the effectiveness of these activities. Two commenters recommended that the Corps furnish this data to the States on an annual basis.

The compensatory mitigation data cited in the July 1, 1998, **Federal Register** notice is based on the acreage of reported wetland impacts and wetland compensatory mitigation. This data does not include compensatory mitigation for impacts to streams and other types of non-wetland aquatic habitats. Many of the non-reporting NWP activities do not result in filling of wetlands and would not normally require compensatory mitigation to ensure that the adverse effects to the aquatic environment are minimal. For NWP activities that do not require notification to the Corps, many permittees request a written determination from the Corps to ensure that their projects qualify for NWP authorization. The wetland impact acreage for these activities is included in the data compiled by the Corps. District engineers can require compensatory mitigation for these projects to ensure that they result in only minimal adverse effects on the aquatic environment.

The data collection systems for most Corps districts do not currently differentiate between the amounts of compensatory mitigation provided through restoration, enhancement, creation, or preservation. Instead, most districts track only the total amount of compensatory mitigation required for Corps permits. The effectiveness of compensatory mitigation efforts is monitored by district engineers on a case-by-case basis, to the extent allowed by workload and personnel resources. Therefore, we cannot collect this type of information. The data the Corps collects on impacts to waters of the United States and compensatory mitigation is public information.

Support and opposition for the use of mitigation banks and in lieu fee programs to compensate for NWP impacts was equivocal. Many commenters asserted that mitigation banks cannot replace the functions and

values of smaller, scattered wetlands and that the increased use of mitigation banks and in lieu fee programs will not replace local wetland functions and values. A couple of commenters were concerned that consolidation of wetland habitats in a single place could increase the vulnerability of that single ecological wetland unit, and would not allow for a mosaic of wetlands. Others argued that mitigation banks would better compensate for scattered wetland losses by providing consolidated locations for compensatory mitigation, with greater chances of success. Some commenters expressed concern that mitigation banking would disrupt the mitigation sequence process and one commenter specifically requested that the Corps place stronger emphasis upon avoidance and minimization of impacts. Many commenters recommended streamlining the process for establishing mitigation banks, and some commenters requested modification of the NWP terms and conditions to encourage the use of mitigation banks. These commenters also requested that the Corps more clearly establish the policy that on-site compensatory mitigation may not always be the preferred choice. Several commenters suggested that mitigation banks should be established in each watershed. Some commenters expressed concern that mitigation banks, in some cases, utilize preservation of aquatic resources, which does not replace lost wetland functions and values, and does not comply with the goal of "no net loss" of wetlands.

We cannot require the establishment of mitigation banks in a particular watershed or geographic area. Mitigation banks are usually constructed and maintained by entrepreneurs, who locate mitigation banks in areas where they believe the established credits will sell quickly. In the December 13, 1996, **Federal Register** notice (61 FR 65874-65922), we did not direct Corps districts to require permittees to use mitigation banks for offsetting wetland losses due to NWP 26, but suggested that mitigation banks could be used, in addition to in lieu fee programs, to provide compensatory mitigation for impacts below 1 acre.

Consolidated mitigation methods, including mitigation banks and in lieu fee programs, are often an efficient means of compensating for losses of waters of the United States, particularly for multiple small projects, and may confer benefits to the aquatic environment as well (see 61 FR 65892). We recognize that mitigation banks and in lieu fee programs are often more practicable and successful because of the planning and implementation efforts

typically expended on these projects by their proponents. In contrast, individual efforts to create, restore, or enhance wetlands to replace small wetland losses may be unsuccessful because of poor planning and/or construction. Furthermore, consolidated mitigation efforts are often better monitored and maintained and often result in the establishment of a larger contiguous wetland area that benefits the overall local aquatic environment and many of the species that utilize larger aquatic habitats. Although smaller, scattered wetland areas that exist in the landscape as a mosaic provide essential habitat for certain species, the local changes in land use usually makes it impossible to maintain those mosaics in any ecologically functional capacity. Recreating those wetland mosaics is often impractical and it is better to provide compensatory mitigation through consolidated mitigation methods.

As with all other compensatory mitigation, the use of mitigation banks and in lieu fee programs does not eliminate the need to avoid impacts on-site. General Condition 19 of the NWPs requires that permittees avoid and minimize losses of waters of the United States on-site to the maximum extent practicable. If the District Engineer determines that compensatory mitigation is necessary to ensure that the particular NWP activity results only in minimal adverse effects on the aquatic environment, individually or cumulatively, then the District Engineer can require compensatory mitigation to offset the loss of waters of the United States. Mitigation banks and appropriate in lieu fee programs can be used to provide the required compensatory mitigation. The preferred form of compensatory mitigation should be based on what is best for the aquatic environment, whether the compensatory mitigation is on-site, off-site, in-kind, or out-of-kind.

Many of the commenters that were opposed to in lieu fee programs were strongly in favor of mitigation banks. Several of these commenters stated that mitigation banks have distinct advantages over in lieu fee programs, since mitigation banks have specific processes to establish goals, credits, and monitoring. Some commenters believe that in lieu fee programs compete unfairly with mitigation banks, since they are easier to establish and are often less costly than mitigation banks. One commenter requested that in lieu fee programs be prohibited in areas with established and functional mitigation banks with available credits.

Mitigation banks and in lieu fee programs are not common throughout the country. Therefore, it would be impractical to require their use as a preferred or sole means of providing compensatory mitigation for impacts authorized by NWP. While in lieu fee programs are used in several Corps districts, efforts continue to ensure that in lieu fee programs provide adequate compensatory mitigation. District engineers have the authority to approve or disapprove the use of specific mitigation banks or in lieu fee programs as compensatory mitigation for losses of waters of the United States authorized by NWP. Permittees should have the flexibility to utilize compensatory mitigation methods that are within their means to accomplish and meet the requirements to offset unavoidable losses of waters of the United States. To the extent practicable, permittees should consider use of approved mitigation banks and other forms of consolidated compensatory mitigation. District engineers will evaluate compensatory mitigation proposals for appropriateness and practicability as indicated in the NWP general conditions.

A number of commenters expressed concern about the effectiveness of in lieu fee programs in providing compensatory mitigation. Many commenters requested the establishment of specific requirements for in lieu fee programs. Two commenters suggested that the Corps establish a data collection system for in lieu fee programs, including payments and program credits, and report this data on an annual basis. Several commenters noted that in lieu fee programs typically do not require completion in advance of utilizing credits, as is the case with mitigation banks. Many commenters stated that payments to in lieu fee programs do not result in replacement of lost wetland functions and values. One commenter suggested limiting the use of in lieu fee programs to compensate for losses of small, low value wetlands and farmed wetlands.

In lieu fee mitigation programs have been effective in some parts of the country. Typically these programs are operated by well-established entities such as State and local government organizations or conservation groups. District engineers review in lieu fee programs to determine if they are appropriate for providing compensatory mitigation for losses of waters of the United States that result from activities authorized by the Corps regulatory program. The District Engineer should have a reasonable amount of confidence

in the operator prior to utilizing such areas for compensatory mitigation. Especially with the NWPs, in lieu fee programs should provide applicants with a compensatory mitigation option that is efficient and appropriate for the authorized work. District engineers use their own methods to track the use of in lieu fee programs. We do not agree that in lieu fee areas should be limited to small areas and farmed wetlands. When evaluating a compensatory mitigation proposal, the Corps should consider the action that is best for the aquatic environment. In some cases, on-site compensatory mitigation may not be a practicable option because there may be a low probability of success or adjacent land uses make any type of on-site compensatory mitigation infeasible. In some locations, an appropriate in lieu fee program may be most appropriate, while in another district or watershed, a mitigation bank would be the best option.

Vegetated Buffers

Some commenters supported the Corps increased emphasis on vegetated buffers adjacent to waters of the United States, including the use of vegetated buffers as compensatory mitigation for impacts to waters of the United States. A number of commenters objected to the requirements for vegetated buffers, stating that requirements for vegetated buffers, particularly upland buffers, adjacent to open and flowing waters are illegal because the Corps would be expanding its jurisdiction to upland areas. Two commenters said that the vegetated buffers can be used as a form of compensatory mitigation, but could not be required for an NWP authorization. One commenter stated that vegetated buffers should not be considered compensatory mitigation because they do not replace lost wetland acreage, including functions and values. Many commenters requested that the Corps provide a more specific definition and minimum size standards for vegetated buffers. A couple of commenters recommended specific minimum widths for vegetated buffers. One commenter suggested a buffer width of 1 or 2 kilometers from the edge of the wetland to preserve maximum biodiversity. Another commenter recommended a minimum buffer width of 100 feet from the edge of the wetland.

We disagree with the assertion that requiring a vegetated buffer as a condition of an NWP authorization is illegal and an attempt to expand the Corps jurisdictional authority. The Corps currently has regulatory authority through the Clean Water Act to require vegetated buffers as a condition of an

NWP authorization because vegetated buffers, including upland buffers, help prevent degradation of water quality and aquatic habitat. The establishment and maintenance of wetland or upland vegetated buffers adjacent to open waters, streams, or other waters of the United States can be considered compensatory mitigation for losses of waters of the United States authorized by Corps permits. One of the goals of the Clean Water Act is the maintenance and restoration of the chemical, physical, and biological integrity of the Nation's waters. Regulatory agencies can place any conditions on a permit or authorization as long as those conditions are related to the activities regulated by that agency. The Section 404 activities regulated by the Corps usually cause adverse effects on the aquatic environment. To offset these adverse effects, we can require measures, such as vegetated upland buffers adjacent to streams, that prevent or reduce adverse effects on the aquatic environment. Vegetated buffers, including uplands, adjacent to open waters of the United States provide many of the same functions and values of wetlands, such as flood mitigation, erosion reduction, the removal of pollutants and nutrients from water, and support aquatic habitat values. In summary, since vegetated buffers adjacent to open waters, even if they are uplands, help maintain the physical, biological, and chemical integrity of the aquatic environment, the Corps can require these buffers as a condition of a Clean Water Act Section 404 permit. Permit applicants must recognize that NWPs are optional permits and if the applicant believes that the NWPs are too restrictive, then he or she can apply for authorization through the individual permit process.

For the purposes of the Corps regulatory program, vegetated buffers are areas inhabited by woody or herbaceous plants that are adjacent to streams, lakes, ponds, wetlands, or other waters of the United States. Vegetated buffers can be either wetlands or uplands. Mowed lawns are not considered vegetated buffers, because these areas do not provide the same functions as areas inhabited by fully grown woody or herbaceous vegetation. Upland vegetated buffers are generally as effective at protecting open water quality as wetland buffers, and are often the only choice where there are no wetlands adjacent to a stream. Vegetated buffers, including uplands, adjacent to open waters, streams, and wetlands, should be an integral part of the compensatory mitigation requirements

for a particular project. Vegetated buffers can be used as out-of-kind mitigation to offset part of the wetland loss because they provide substantial benefits for the local aquatic environment. Vegetated buffers provide the following functions and benefits to the aquatic environment: (1) Reducing adverse effects to water quality by trapping and removing sediments, pollutants, and nutrients from surface runoff; (2) enhancing infiltration of water into the soil, which allows plants and microbes to remove nutrients and pollutants from water; (3) decreasing storm flows to streams, thereby reducing downstream flooding and degradation of aquatic habitat; (4) decreasing erosion of stream beds and surrounding land by slowing stormwater runoff velocities and increasing infiltration; (5) reducing soil erosion by keeping the soil in place with plant roots; (6) maintaining fish habitat by reducing water temperature changes; (7) providing detritus from riparian vegetation that contributes to the aquatic food web; (8) providing aquatic habitat features such as snags and shade; (9) providing habitat to a wide variety of aquatic and terrestrial species; and (10) providing corridors for movement of many species of wildlife.

For the purposes of the NWP, vegetated buffers should consist mostly of native trees and shrubs. In drier areas of the United States, vegetated buffers can consist of herbaceous vegetation, provided the vegetation is not mowed or removed. Native trees and shrubs should be planted, where possible, to establish a vegetated buffer where one does not exist. If the buffer area is degraded or inhabited by invasive or exotic plant species, then these species should be removed and the area planted with appropriate native species to the extent practicable.

Districts should normally require vegetated buffers that are between 50 and 125 feet wide. For streams, the width of the buffer is measured out from the bank of the stream, not the width across the stream (*i.e.*, the buffer will be 50 to 125 feet wide on each side of the stream channel). For other open waters, the width of the buffer is measured from the bank; if no bank is present, the ordinary high water mark should be used instead. District engineers will use their discretion and judgement to determine appropriate vegetated buffer widths for particular projects. If adequate State or local buffer width requirements already exist, district engineers should utilize the same requirements. The width of the vegetated buffer required as part of the NWP authorization must balance the benefits provided to the aquatic

environment with the uses of the property resulting from the authorized work. Buffer widths should not be excessive, with little additional benefits for the aquatic environment. Buffer width requirements can also depend on the condition of the local watershed. The Corps will determine what is best for the watershed involved, and what is practicable to the applicant.

Conservation easements, deed restrictions, or similar restrictions should be imposed on the vegetated buffer to ensure that the buffer is maintained. Developers should be encouraged to place vegetated buffers in community open space areas, especially when such areas are required by State or local statutes or regulations. Recreational (*e.g.*, hiking, nature, etc.) trails should generally be constructed outside of the vegetated buffer area, but these trails may be constructed within the buffer, provided the buffer is wide enough to accommodate the trail and the trail is constructed in such a manner so that it does not adversely affect the functions of the buffer.

Assessing Cumulative Impacts on a Watershed Basis

A number of commenters stated that it is difficult to determine when an adverse effect on the aquatic environment is minimal on an individual or cumulative scale. These commenters said that the Corps needs to utilize technological improvements, such as geographic information systems, to make these determinations because they believe the Corps current data collection efforts are inadequate to assess cumulative adverse effects on the aquatic environment. One commenter suggested that permit applicants should be required to identify past and future impacts for projects and that the remaining wetlands on the site should be deed restricted.

In the July 1, 1998, **Federal Register** notice, we discussed our current data collection efforts for NWPs, regional general permits, and standard permits. We are continuously modifying our methods of data collection to improve our ability to assess cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps regulatory program. For each authorized activity, the United States Geological Survey (U.S.G.S.) hydrological unit code is entered in the database to record which watershed the activity is located. This data, along with other data collected for each authorized activity, will be used to assess the cumulative adverse effects on that watershed that result from activities authorized by the Corps.

Since the Corps resources are limited, the amounts and types of data that can be collected must strike a balance between the amount of work required to evaluate permit applications and the usefulness of the data to monitor the cumulative adverse effects of those permitted activities on the aquatic environment. The data collected by the Corps regulatory program is limited to the data necessary to assess cumulative adverse effects so that the Corps can effectively evaluate permit applications and conduct enforcement and compliance activities. The Corps recognizes that there are gaps in the data collection effort because many of the activities authorized by NWPs do not require preconstruction notification to the Corps. However, in many cases where the NWP activity does not require notification to the Corps, permit applicants request that the Corps verify that the proposed work qualifies for authorization under the non-reporting NWP. The impacts from these projects are included in the data collected by the Corps, so the data collection gap is not as great as some critics of the NWP program believe. We do not have the resources to provide field verification of the adverse effects of all activities authorized by NWPs. We also cannot fully monitor all of the compensatory mitigation that is required as special conditions to many NWP authorizations.

For the proposed new and modified NWPs, we will continue to collect data on a watershed basis to ensure that the use of the NWPs does not result in more than minimal adverse effects on the aquatic environment. The Corps will continue to improve its data collection efforts for all types of permits, not just NWPs, to better assess the adverse effects of the Corps regulatory program on the aquatic environment.

When assessing cumulative adverse effects on the aquatic environment, particularly on a watershed basis, it is important to note that we can only assess those adverse effects that result from activities authorized by the Corps pursuant to Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act. The aquatic environment is also adversely affected by activities that do not require a Corps permit. For example, construction of an upland residential development can result in adverse effects on water quality and aquatic habitat due to the removal of woody vegetation in upland riparian zones and surface runoff. Development and landclearing activities in adjacent or nearby uplands can substantially

alter the watershed, adversely affecting the local aquatic environment, but such activities are not regulated under Section 404 of the Clean Water Act.

Compliance With the Endangered Species Act

A number of commenters indicated that the NWP do not satisfy the requirements of the Endangered Species Act (ESA), especially for those activities that do not require submission of a PCN to the Corps. These commenters expressed concern that NWPs do not provide the necessary coordination required by ESA where proposed activities may adversely affect endangered or threatened species. One commenter stated that an individual permit should be required for activities within critical habitat for Federally-listed endangered and threatened species. Several commenters remarked that the Corps should condition the NWPs to prohibit activities that adversely affect State-listed endangered or threatened species. One of these commenters cited the reference to State-listed endangered or threatened species in the regulations for the Section 404(b)(1) guidelines (40 CFR part 230). A few commenters indicated that the NWPs focus too much on wetlands with little consideration of other aquatic habitats, such as streams and rivers inhabited by salmon and trout. Several commenters stated that the Corps is in compliance with the ESA because the NWPs are conditioned so that no activity authorized by NWPs may jeopardize the continued existence of a listed species or its critical habitat. These commenters assert that the Corps should not conduct programmatic formal consultation for activities that have already been determined not to result in adverse effects on endangered or threatened species.

The NWP program contains provisions to ensure that activities authorized by NWPs comply with the ESA. General Condition 11 ensures that the NWPs do not authorize any activity that is likely to jeopardize the continued existence of a Federally-listed threatened or endangered species or a species proposed for designation as a threatened or endangered species or which is likely to modify the critical habitat or such species. In addition, an NWP authorization does not authorize the "take" of any Federally-listed threatened or endangered species. If any listed species or designated critical habitat may be affected by an activity authorized by NWP, the permittee is not authorized to begin work until the requirements of the ESA have been satisfied. The Corps will conduct the

coordination necessary to ensure that activities authorized by NWPs comply with the ESA.

For activities that occur in the vicinity of endangered or threatened species or their designated critical habitat, division and district engineers can regionally condition the NWPs to require notification to the Corps to allow case-by-case review of these activities and ensure compliance with the ESA. It is unnecessary to require an individual permit for NWP activities that may affect endangered or threatened species or designated critical habitat. If the Corps determines that an NWP activity may affect a Federally-listed endangered or threatened species, then the Corps will request formal consultation unless it is not required by 50 CFR Part 402.14(b). After completion of consultation with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS), the Corps will determine whether or not the proposed work will be in compliance with Section 7(a) of the ESA. After the Corps makes this determination, the project can be authorized by NWP or the Corps will notify the applicant that no permit can be issued.

In the proposed General Condition 25, entitled Designated Critical Resource Waters, we are proposing to prohibit the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened or endangered species, coral reefs, State natural heritage sites, or outstanding national resource waters officially designated by the state where those waters area located. General Condition 25 also states that discharges are not authorized by NWPs in designated critical habitat for Federally-listed endangered or threatened species, unless the activity complies with General Condition 11 and the FWS or NMFS has concurred in a determination of compliance with this condition. General Condition 25 is discussed in more detail elsewhere in this **Federal Register** notice.

The Corps does consider the effects of NWP activities on State-listed endangered or threatened species within the overall evaluation of the proposed activity. The provisions relating to endangered or threatened species in the Section 404(b)(1) guidelines apply only to species listed under the Federal Endangered Species Act (see 40 CFR 230.10(b)(3)), although there is some discussion of potential impacts to State-listed endangered and threatened species in 40 CFR Part 230.30. To

address local concerns for the aquatic environment, division engineers can regionally condition the NWPs to restrict their use for activities that may adversely affect State-listed species or their designated critical habitat.

Some commenters questioned the Corps ability to issue any NWPs prior to completion of programmatic consultation with the FWS and NMFS. Another commenter recommended that, instead of programmatic ESA consultation for the NWP, the Corps should conduct consultation at a district or regional level to establish programmatic or categorical mechanisms to comply with the ESA. This commenter believes that programmatic consultation will not adequately address specific ESA concerns. One commenter noted that the request for formal ESA consultation cited in the July 1, 1998, **Federal Register** notice is inconsistent with the Corps finding that the NWP program complies with the ESA. Several commenters requested that the Corps conduct an analysis of the cumulative effects of the NWP program on endangered and threatened species and their critical habitat. A commenter stated that the Standard Local Operating Procedures for Endangered Species (SLOPES) established by some districts are inadequate for complying with ESA. Two commenters requested clarification as to whether or not the incidental take provisions under ESA apply to obligate wetland endangered or threatened species.

We believe that the NWP program complies with the ESA and adequately addresses concerns for endangered and threatened species and their designated critical habitat. In spite of the provisions of General Condition 11 and the ESA Section 7(d) determination issued on June 10, 1997, which states that the NWPs do not adversely affect listed species or critical habitat, formal programmatic ESA consultation for the NWP program was initiated with the FWS and NMFS on June 4, 1999. The programmatic consultation will provide additional assurance that the existing NWPs, as well as the proposed new and modified NWPs, have a formal process to develop any necessary additional procedures at the district level. The programmatic consultation will provide further assurance that the NWP program does not jeopardize the existence of any Federally-listed threatened or endangered species. Both the programmatic ESA consultation and the Programmatic Environmental Impact Statement that will be prepared for the NWP program will address potential cumulative effects on endangered and

threatened species and their designated critical habitat. We believe that the SLOPES help ensure compliance with the ESA at the district level. Districts can meet with local offices of the FWS and NMFS to modify or improve their SLOPES.

In addition to NWP General Condition 11, division and district engineers can impose regional conditions on the NWPs and case-specific conditions to address endangered or threatened species or their critical habitat. For example, Corps regional conditions can prohibit the use of NWPs in designated critical habitat for endangered or threatened species or require notification for activities in areas known to be inhabited by threatened or endangered species. Some Corps districts have conducted programmatic consultation on geographic areas. These efforts usually consider the NWP program in that particular area. In summary, General Condition 11, Corps regional conditions, case-specific special conditions, and SLOPES will ensure that the NWP program complies with the ESA. General Condition 11 states that the NWPs do not authorize the "take" of any Federally-listed endangered or threatened species. It does not matter if the species is an "obligate" wetland endangered or threatened species.

Additional Issues

In response to the July 1, 1998, **Federal Register** notice, some commenters raised several new issues relating to the NWPs. A large number of commenters believe that the Corps is attempting to expand its jurisdictional authority by requiring upland vegetated buffers adjacent to waters of the United States as a condition of the NWPs. Some commenters stated that the Corps is also trying to expand its jurisdictional authority by applying the NWPs to activities that involve excavation of waters of the United States. Several commenters suggested additional restrictions for the NWPs. Other issues include: the use of multiple NWPs to authorize a single and complete project (often referred to as "stacking" of NWPs), the Corps data collection efforts, the use of NWPs on Tribal lands, compliance with Section 106 of the National Historic Preservation Act, enforcement of the NWPs, property rights issues, and State and local authorities.

Expansion of Jurisdictional Authority: Many commenters questioned the Corps authority to require upland vegetated buffers adjacent to open waters, streams, and wetlands, since uplands are not waters of the United States. Some

commenters believe that if vegetated buffers are necessary to protect water quality, then only the appropriate water quality certification agency can require the vegetated buffer. Other commenters stated that the Corps is exceeding its regulatory authority by including excavation activities in the new NWPs.

We have the legal authority to require vegetated buffers adjacent to streams and other waters through the Clean Water Act. The goals of the Clean Water Act include the maintenance of the biological, chemical, and physical integrity of the aquatic environment. The activities regulated by the Corps pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act usually cause adverse effects on the aquatic environment. As compensatory mitigation for losses of waters of the United States, we can require measures, such as vegetated upland buffers adjacent to waters, that offset such adverse effects. Since vegetated buffers adjacent to waters, even if they are uplands, help maintain the physical, biological, and chemical integrity of the aquatic environment, the Corps can require these buffers as a condition of a Clean Water Act Section 404 permit.

Another activity that many commenters believe to be an attempt to expand the Corps regulatory authority is the inclusion of excavation activities in the NWPs, particularly in the definition of "loss of waters of the United States." These commenters cited the recent decision by the United States Court of Appeals for the District of Columbia which upheld the United States District Court for the District of Columbia's decision in the *American Mining Congress v. Corps of Engineers* lawsuit. This lawsuit challenged the Corps and EPA's revised definition of "discharge of dredged material" that was promulgated on August 25, 1993 (58 FR 45008). The revised definition of "discharge of dredged material" was overturned because the District Court held that the rule was outside of the agencies' statutory authority and contrary to the intent of Congress by asserting Clean Water Act jurisdiction over activities where the only discharge associated with the activity is "incidental fallback." These commenters requested that the Corps remove all references to excavation activities from the new and modified NWPs.

Although the revised definition of "discharge of dredged material" published on August 25, 1993, was overturned by these recent court decisions, certain excavation activities are still regulated under Section 404 of

the Clean Water Act and require a Corps permit. Excavation activities that result in redeposits of dredged material into waters of the United States other than incidental fallback require a Section 404 permit. All other excavation activities, if they result in the replacement of an aquatic area with dry land or changing the bottom elevation of a waterbody require a Section 404 permit, and may be authorized by NWPs if they comply with the terms and limits of the NWPs. Excavation activities that result only in discharges classified as "incidental fallback" do not require a Section 404 permit. We have retained the excavation language in the proposed new and modified NWPs and the definition of "loss of waters of the United States" to make it clear that some excavation activities still require a Section 404 permit, and if so, may be authorized by NWPs. A final rule was published in the May 10, 1999, issue of the **Federal Register** (64 FR 25119-25123) with revisions to the Clean Water Act regulatory definition of "discharge of dredged material." The revision clarifies the definition of "discharge of dredged material" by deleting language from the regulatory definition at 33 CFR Part 323.2(d) that was held by the Court to exceed the Clean Water Act statutory authority.

Proposed Additional Restrictions for NWPs: In spite of the increased emphasis on regional conditioning for the new and modified NWPs proposed in the July 1, 1998, **Federal Register** notice, many commenters recommended additional restrictions that they believe should be applied to all NWPs. Several commenters recommended prohibiting the use of NWPs to authorize activities in wetlands that cannot be replaced through wetland restoration or creation, such as bogs, fens, forested wetlands, and vernal pools. One commenter advocated prohibiting the use of NWPs to authorize activities in endangered ecosystems, as identified by the National Biological Service. Two commenters recommended excluding NWPs from areas subject to watershed restoration plans, since many of these projects are funded by Federal agencies. One commenter recommended allowing the NWPs to be used only in states that have developed conservation plans that protect water quality, with no net loss of wetland function and acreage as a goal. This commenter described the State conservation plan as requiring a fee system to achieve the no net loss goal through restoration, preservation, and management of wetlands, with the funds from fees being spent only on projects, not overhead. Several

commenters recommended prohibiting the use of NWP in watersheds that have lost more than 50% of their wetlands. A number of commenters recommended excluding NWP in watersheds upstream or within Outstanding National Resources Waters and within critical resource waters. One of these commenters suggested that the Corps solicit public comments to identify critical resource waters. Regional conditions can be used to prohibit or restrict the use of NWP from high value waters, especially if those waters are difficult to restore or create. We do not agree that NWP should be excluded from use in areas under watershed restoration plans. Some activities authorized by NWP may comply with the watershed restoration plan, and some compensatory mitigation required by NWP authorizations for work within that watershed may provide net benefits for the watershed. Prohibiting the use of NWP in watersheds that have lost greater than 50% of their wetlands would be impossible to implement, because we cannot identify with a defensible degree of certainty the extent of jurisdictional wetlands that existed in that watershed. These commenters did not provide any suggestions to determine the historic extent of wetlands in a watershed or recommend a date to determine the historic baseline for wetlands. In the October 14, 1998, **Federal Register** notice, we proposed to exclude the NWP from critical resource waters and requested comments on how to identify those waters for a national NWP general condition. This proposal is discussed elsewhere in this **Federal Register** notice.

Many commenters, notably the Federal Emergency Management Agency (FEMA), recommended restricting the use of NWP within floodplains. FEMA stated that the use of NWP in the 100-year floodplain is contrary to the Administration's goal of reducing natural hazard impacts on citizens because the NWP provide Federal authorization for activities in floodplains. FEMA believes that the Corps should only authorize activities within designated Special Flood Hazard Areas through the individual permit process and that the NWP should contain a provision stating that the NWP program does not usurp State and local floodplain management programs and regulations governing activities within floodplains. A few commenters stated that the NWP should not authorize activities that result in a net loss of flood storage capacity within the 100-year floodplain. Several commenters

recommended excluding the NWP from watersheds or areas upstream of communities that have been designated as flood disaster areas in the past 10 years.

In the October 14, 1998, **Federal Register** notice, we proposed to prohibit the new NWP from authorizing permanent above-grade wetland fills in waters of the United States within the 100-year floodplain, as mapped by FEMA on their Flood Insurance Rate Maps. This proposal is discussed elsewhere in this **Federal Register** notice.

A number of commenters recommended excluding the use of NWP in tributaries identified as impaired through Section 303(d) of the Clean Water Act due to the loss of wetlands. Several commenters suggested restricting the use of NWP in impaired waters and requested that the Corps solicit public comments on how to identify impaired waters. Other commenters recommended suspending the use of NWP in areas designated as source water zones under the Safe Drinking Water Act or prohibiting the use of NWP in drinking supply watersheds.

In the October 14, 1998, **Federal Register** notice, we proposed to limit the use of NWP in waterbodies and aquifers identified by States as impaired due to the loss of wetlands. This proposal is discussed elsewhere in this **Federal Register** notice. Division and district engineers can regionally condition any of the NWP to prohibit or restrict their use in designated source water zones under the Safe Drinking Water Act or drinking water supply watersheds. District engineers can also exercise discretionary authority for activities that may result in more than minimal adverse effects on these areas.

Some commenters requested that the Corps prohibit the use of NWP in waters or watersheds with designated critical habitat for Federally-listed endangered or threatened species. One commenter recommended excluding the use of NWP in habitats designated by the FWS or NMFS as crucial for endangered or threatened species, unless the work is for habitat restoration.

General Condition 11 and SLOPES that are developed by Corps districts adequately address the use of NWP in designated critical habitat for Federally-listed endangered or threatened species. Please also see the discussion of General Condition 25 elsewhere in this **Federal Register** notice.

Use of Multiple Nationwide Permits:

A number of commenters objected to the use of more than one NWP for a single

and complete project, believing that this practice results in more than minimal adverse effects on the aquatic environment. Several commenters objected to adding any restrictions against the use of more than one NWP to authorize a single and complete project, stating that it does not necessarily result in more than minimal adverse effects on the aquatic environment. One of these commenters believes that the notification process is sufficient to determine when specific projects requiring the use of more than one NWP will result in more than minimal adverse effects on the aquatic environment.

We are proposing to modify General Condition 15 to address concerns for the use of multiple NWP to authorize a single and complete project. The proposed modification of this general condition does not allow more than one NWP to authorize a single and complete project if the acreage loss of waters of the United States exceeds the highest specified acreage limit of the NWP used to authorize that project. In the proposed NWP we have removed the conditions that address the use of specific NWP with those NWP. The proposed modification of General Condition 15 is discussed in further detail below.

Data Collection: Several commenters believe that the Corps current data collection efforts fail to effectively monitor both the individual and cumulative adverse effects on the aquatic environment resulting from the use of the NWP. These commenters stated that the Corps does not know how many NWP activities that do not require submission of a PCN occur, the acreage of impact authorized by these non-reporting NWP, and what types of compensatory mitigation, if any, are provided to offset losses of waters of the United States authorized by these NWP. A number of commenters requested that the Corps track losses of waters of the United States authorized by non-reporting NWP. One commenter stated that the Corps should not limit the use of NWP until it knows for certain how many wetlands are lost each year.

For those activities that are reported to the Corps, including activities authorized by NWP, regional general permits, and individual permits, the Corps monitors the individual and cumulative adverse effects on the aquatic environment. The individual adverse effects are evaluated on a case-by-case basis when the Corps reviews the PCN or conducts the public interest review. It should also be noted that many NWP permittees request that the

Corps provide written confirmation that the proposed work is authorized by NWP, even though submission of a PCN to the Corps is not required. This allows the Corps to track many of the activities that are authorized by non-reporting NWPs and include the adverse effects of those activities in its analysis of individual and cumulative adverse effects, plus any compensatory mitigation provided to offset those impacts.

Cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps regulatory program are assessed by district engineers on a watershed or regional basis. District engineers utilize data collected on authorized activities for which the Corps issues general permit authorizations or standard permits, as well as estimates of the number of activities authorized by non-reporting general permits. Based on the actual and estimated impacts to aquatic resources, district engineers determine if the cumulative adverse effects on the aquatic environment resulting from the use of general permits, including NWPs, are more than minimal. Activities authorized by individual permits are not required to result in minimal adverse effects on the aquatic environment because that statutory requirement applies only to general permits. To prohibit the use of general permits in a watershed or other geographic area, the District Engineer must demonstrate that more than minimal cumulative adverse effects on the aquatic environment are caused by the Corps permit decisions. This demonstration must include clear, extensive, and unequivocal evidence that activities regulated pursuant to Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act are causing the cumulative adverse effects on the aquatic environment, not unregulated activities. Activities that are not regulated by the Corps program are not factored into this analysis because they are outside of the purview of the Corps.

Other commenters stated that inconsistencies in data collection efforts exist between Corps districts and that the data collected by the Corps is inaccurate. They said that some districts do not collect the same types of data that other districts collect. These commenters assert that these inconsistencies result in inaccurate data reported at a national level. One commenter stated that the Corps should make all NWP information, such as the number of PCNs, NWP verifications, authorized losses, mitigation, and enforcement actions available on the Internet.

There are standard data collection requirements for the Corps regulatory program. The data collected by each district for both general and individual permits was discussed in the July 1, 1998, **Federal Register** notice. As stated in the July 1, 1998, **Federal Register** notice, data collection requires a balance between the amount of work required to evaluate applications for Corps permits and the usefulness of the collected data to assess adverse effects of those activities on the aquatic environment. The specific types of data collected are limited to data that is necessary to evaluate the cumulative adverse effects on the aquatic environment that result from activities authorized by the Corps, while allowing the district the time and personnel to effectively evaluate permit applications and conduct enforcement activities. There are minimum standards for data collection for the Corps regulatory program, but some districts may collect additional data for their own use, if it is needed to satisfy other requirements. In the future, the Corps may modify its data collection standards to improve its assessment of the adverse effects of regulated activities on the aquatic environment and to provide more information to the public concerning the regulatory program. To make NWP program data, such as the number of PCNs, NWP verifications, authorized losses, mitigation, and enforcement actions, available for public access on the Internet is impractical, since each district maintains its own regulatory database.

Tribal Issues: Several comments were received from Native American organizations regarding tribal issues relating to the NWPs. Some of these commenters expressed concern that use of the NWPs would result in adverse effects on water quality and fish habitat, and that the tribes would not receive notification for projects on tribal land. One commenter requested that the Corps add the following sentence at the end of General Condition 8, Tribal Rights: "Nothing in this permit shall be construed to be authority or permission to conduct development, construction, or any other activity in waters of the United States with the exterior boundaries of a Federally-recognized Indian tribe in the absence of prior authority or permission being granted by such Tribal government." According to this commenter, some people believe that an NWP authorization constitutes permission to do work on Tribal lands without prior permission of the Tribe. Another commenter opposes issuance of NWP authorizations for activities within

the boundaries of Tribal lands without the opportunity for public notice and comment. One commenter stated that reservation watersheds should be considered high value waters and receive additional protection and that the Corps should consult with the appropriate Tribal governing authority prior to issuing NWP authorizations for activities in a reservation watershed. One commenter said that the procedures of the Corps Native American Policy must be followed prior to the issuance of the NWPs.

Division engineers can regionally condition the NWPs to prohibit or limit their use in high value waters, including high value waters on Tribal lands. We have provided opportunities to discuss potential regional conditions with Tribes, through district public notices for the new and modified NWPs. Tribes with Section 401 authority can deny water quality certification for the NWPs and require individual 401 certifications, which would allow those Tribes to review all proposed NWP activities and determine if those activities meet their water quality standards.

As with all Corps permits, the NWPs do not convey any property rights or any exclusive privileges (see 33 CFR Part 320.4(g) and the "Further Information" section of the NWPs). Issuance of an NWP authorization does not preclude the permittee from obtaining permission from the appropriate Tribal government, if such permission is necessary. Therefore, it is unnecessary to add the requested language to General Condition 8. Concerns for high value waters that occur on Tribal lands are more appropriately addressed through the regional conditioning process, but we disagree with the assertion that all reservation watersheds are high value waters.

Compliance with Section 106 of the National Historic Preservation Act: Several commenters expressed concern regarding how the new and modified NWPs will comply with Section 106 of the National Historic Preservation Act (NHPA) and how the permittee will know if the proposed work will affect a historic resource. Another commenter stated that the NWP program is not in compliance with the NHPA and its implementing regulations at 36 CFR Part 800, because the 5-day agency coordination period for PCNs is too short, since a 30-day comment period is required by 36 CFR Part 800.2.

NWP General Condition 12 addresses compliance with Section 106 of the NHPA. This general condition states that any activity which may affect

historic properties listed, or eligible for listing, in the National Register of Historic Places is not authorized, unless the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. For activities authorized by non-reporting NWP, permittees concerned about compliance with General Condition 12 should contact the State Historic Preservation Officer (SHPO) to determine if the proposed work will affect historic properties. For NWP activities that require submission of a PCN to the Corps, the Corps will evaluate the PCN to determine if coordination with the SHPO is necessary to ensure compliance with the NHPA. In areas such as designated historic districts, division engineers can regionally condition the NWPs to require coordination with the SHPO to ensure compliance with the NHPA. The Corps regulations for ensuring compliance with the NHPA are found at 33 CFR Part 325, Appendix C, not 36 CFR Part 800.

Enforcement: Several commenters stated that the proposed new and modified NWPs did not mention enforcement. These commenters are concerned that the terms and limits of the NWPs may be largely ignored unless enforcement is specifically addressed in the text of the NWPs. Another commenter said that the discussion of the Corps data collection procedures did not address how many enforcement actions were taken on projects that violated NWP terms and conditions. A number of commenters expressed concern that the requirements for on-site avoidance and minimization are not enforced. Several commenters believe there is a lack of monitoring and enforcement of general permits, including NWPs.

Enforcement of Corps permits, including NWPs, is addressed in 33 CFR Part 326. District engineers use discretion to enforce non-compliance with the terms and conditions of the NWPs, including any regional conditions or case-specific conditions. Although the discussion of the Corps data collection procedures did not specifically address enforcement activities, these activities are included in our data collection systems. We conduct compliance reviews to determine if permittees do the work in accordance with NWP authorizations, including any requirements for avoidance and minimization. Although Corps districts cannot conduct compliance reviews for every activity authorized by NWPs, they will conduct compliance reviews to the extent that their district resources allow. Enforcement activities will be

prioritized by first investigating suspected violations that are reported by citizens and then performing compliance checks on other projects.

Other Issues: Two commenters believe that the proposed new and modified NWPs infringe upon individual property rights and that the Corps does not have the authority to require compensatory mitigation that is not directly proportional to the adverse effects of the authorized work. Several other commenters requested that the Corps adopt a separate appeals process for the NWP program, similar to the process currently being developed for individual permits. Several commenters requested that the Corps implement an appeals process for jurisdictional determinations. One commenter requested that all of the NWPs include a condition requiring deed restrictions for all remaining wetlands on the property. One commenter stated that the proposed NWPs are contrary to the Fair Housing Act because the NWPs make it more difficult to build affordable housing.

For certain types of activities, the proposed new and modified NWPs provide property owners and project proponents with an efficient means of obtaining the authorizations necessary to comply with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, provided those activities result in minimal adverse effects on the aquatic environment, individually or cumulatively. The NWPs allow property owners to use their land in compliance with these Federal laws. District engineers can require compensatory mitigation that is necessary to offset the losses of waters of the United States and ensure that the authorized work, with compensatory mitigation, results in minimal adverse effects on the aquatic environment.

We believe that it is unnecessary to develop a separate appeals process for the NWP program. It is important to recognize that the NWPs are optional permits. If a permittee does not want to comply with the terms and conditions of the NWP authorization, he or she can request authorization through the individual permit process. If the prospective permittee objects to the terms and conditions of the individual permit or is denied an individual permit, then he or she could use the regulatory appeals process, once it is implemented. We are not certain when an appeals process for jurisdictional determinations will become effective.

We cannot condition the NWPs to require deed restrictions on all remaining wetlands on the property for a particular project, unless the deed

restriction is for a compensatory mitigation requirement that is fulfilled through the preservation of wetlands on the property. If there are remaining wetlands on the property after the completion of the authorized work, the landowner must obtain another Section 404 permit to do any further work on the property that involves discharges of dredged material into waters of the United States. Requiring a deed restriction for all remaining waters of the United States on the property may be considered as a taking of private property, unless the waters to be protected by the deed restriction are used to satisfy a compensatory mitigation requirement.

We do not agree that the proposed new and modified NWPs violate the Fair Housing Act. The proposed NWPs will provide developers with an expedited permit process that authorizes activities in waters of the United States that have minimal adverse effects on the aquatic environment. Although the proposed new and modified NWPs contain conditions that provide additional protection for the aquatic environment, which may increase costs for some builders, we still believe that the NWPs are a cost-effective means of complying with the Clean Water Act. It is important to remember that NWPs and other general permits are optional permits, and if the project proponent does not want to comply with all terms and conditions of the NWP, then he or she can apply for an individual permit.

One commenter requested that the new NWPs authorize water impoundments and other water development activities that have minimal adverse effects. Another commenter stated that the NWPs should authorize the construction of water diversion, storage, and reuse facilities. Another commenter suggested that NWP 16 requires revision because the quality of return water from the contained upland disposal site should be addressed through Section 402, not Section 401, of the Clean Water Act.

During the development of the new NWPs to replace NWP 26, we found that the use of NWP 26 to authorize discharges of dredged material into waters of the United States for the construction of water impoundments and water diversion, storage, and reuse facilities was not widespread across the country. We believe that it is more appropriate for Corps districts to develop regional general permits for these activities, where the construction of impoundments occurs regularly with minimal adverse effects on the aquatic environment. The citation in NWP 16 to

Section 401 of the Clean Water Act is correct, because the runoff or overflow from a contained land or water disposal area has been defined as a "discharge of dredged material," which requires a Section 401 water quality certification (see 33 CFR Part 323.2(d)).

General Comments on October 14, 1998, Federal Register Notice

Many commenters were generally in favor of the proposed restrictions on NWP activities within the 100-year floodplain, designated critical resource waters, and impaired waters published in the October 14, 1998, **Federal Register** notice, but stated that the proposed changes still do not provide enough environmental protection and further restrictions on the NWPs are needed. A large number of commenters objected to the proposed additional restrictions, stating that the proposal contained little factual basis, the proposal was too vague to allow meaningful comment, or the proposal was unsupported because it did not contain an analysis of the potential effects it would have on the regulated public. Several commenters said that this proposal was based on an inadequate administrative record and that there is little or no documentation supporting the need for these additional restrictions. These commenters requested that the Corps demonstrate that the relevant factors have been considered when it makes its final decision concerning these restrictions and supplement its record to justify the need for these limitations if they are adopted. A few commenters requested that the Corps conduct an analysis of the effects of the proposed additional restrictions including: (1) The land area affected by the proposal; (2) the environmental benefits; (3) the costs to the regulated public, including the cost of compliance and potential delays; and (4) the workload implications to the Corps and other agencies. Many of these commenters stated that the proposed restrictions would be too burdensome to the regulated public, with few tangible added environmental benefits. Other objections expressed by many commenters are that the proposed restrictions would result in more activities requiring individual permits, they would remove any streamlining from the permit process provided by the NWPs, and they would result in increased costs and delays to the regulated public.

The NWP restrictions proposed in the October 14, 1998, **Federal Register** notice were intended to solicit comments from the public to provide the Corps with information regarding

their effects on the regulated public, problems with implementation of the proposed restrictions, how to identify the areas that should be subject to the restrictions, and to which NWPs the restrictions should apply. As discussed below, we have thoroughly evaluated all of the comments received in response to the October 14, 1998, **Federal Register** notice and have made some changes to the proposed restrictions based on those comments. These additional NWP restrictions could create substantial burdens for the regulated public, because many project proponents will be required to apply for an individual permit or provide additional information to demonstrate compliance with these new NWP conditions. We believe that the proposed new restrictions will result in better protection of the aquatic environment and are necessary to address certain public interest factors, such as flood hazards, floodplain values, and high value waters.

A couple of commenters requested that the Corps provide the public with another opportunity to comment on the proposed restrictions, based on information provided by comments received in response to the October 14, 1998, **Federal Register** notice. One commenter stated that the proposal violates the Unfunded Mandates Reform Act by not conducting a regulatory assessment for each proposed restriction. Another commenter believes that the proposal is contrary to Section 404(e)(2) of the Clean Water Act, which requires a public hearing before revoking or modifying general permits.

Because of the modified public participation process the public has, with this **Federal Register** notice, another opportunity to comment on the proposed restrictions, with more complete information to evaluate those restrictions. Since the proposed restrictions may be implemented as NWP general conditions and are not new regulations, we are not required to conduct a regulatory assessment pursuant to the Unfunded Mandates Reform Act. The proposed restrictions do not substantially change the NWPs themselves, so we are not required to conduct a public hearing in accordance with Section 404(e)(2) of the Clean Water Act.

A number of commenters stated that the goals of the proposed additional NWP restrictions can be achieved through other means, instead of establishing national conditions for the NWP program. These commenters believe that the use of existing NWP general conditions, regional conditions, revocation of NWPs in certain

geographic regions, preconstruction notifications, avoidance and minimization requirements, and discretionary authority are adequate to ensure that the NWPs do not authorize activities with more than minimal adverse effects to designated critical resource waters and impaired waters. Examples of general NWP requirements cited by some of these commenters include the establishment and maintenance of vegetated buffers adjacent to open waters and streams, water quality management plans, stormwater management, maintenance of water flows, and compensatory mitigation. Some commenters said that the proposed restrictions are more appropriately handled by State and/or local governments. Several commenters stated that the proposed limitations should be done through regional conditions instead of the NWP general conditions.

We agree that some of the goals of proposed restrictions can also be achieved through some of these means, but to ensure that concerns for floodplains, impaired waters, and designated critical resource waters are addressed consistently across the country, we believe that these restrictions should be implemented as NWP general conditions.

Many commenters objected to the proposal because terms such as "critical resource waters" and "impaired waters" were not defined. Other commenters based their objections on estimates that the proposed restrictions would exclude the use of NWPs from the approximately 40% of the Nation's waters that are considered impaired and the 8% of the land area of the continental United States that is within the 100-year floodplain. One commenter believes that the proposed restrictions are unlikely to result in a net increase in wetlands or improve water quality.

One of the objectives of the October 14, 1998, **Federal Register** notice was to solicit public comment on definitions for these terms and criteria to identify critical resource waters and impaired waters. We received many recommendations to help us identify those waters nationally. Each of the proposed restrictions on the NWP program are discussed below in separate sections. The intent of the proposed restrictions is to better protect the aquatic environment, not to produce a net increase in wetlands.

A large number of commenters supported the Corps decision to allow public comment on the final NWPs and final Corps regional conditions. A couple of commenters requested a 60-day comment period instead of a 45-day

comment period. Two commenters asked if the Section 401 agency will have another opportunity to evaluate any changes to the NWP that may occur as a result of comments received in response to that **Federal Register** notice. These commenters stated that the 401 agency should have another period of review to make new Section 401 determinations. Another commenter stated that 60 days is insufficient for Tribes to make Section 401 or CZM determinations on the new NWPs because EPA must approve the Tribes' application to administer Section 401 water quality standards and approve those standards.

We believe that 45 days is an adequate amount of time for the public to comment on the draft new and modified NWPs and Corps regional conditions because of the previous opportunities for public comment. Because of the changes to the issuance process for the proposed new and modified NWPs, the 401 and CZMA agencies will make their determinations based on final NWPs and Corps regional conditions, since those NWPs and regional conditions will be issued before the final 60-day WQC/CZMA determination period begins. If a Tribal agency does not currently have EPA approval to administer Section 401 water quality standards or EPA has not yet approved their water quality standards, then the agency that currently has Section 401 authority must make the determination.

Withdrawal of NWP B

In response to the October 14, 1998, **Federal Register** notice announcing the Corps withdrawal of the proposed NWP B for master planned development activities, a large number of commenters expressed their support for the withdrawal of that proposed NWP. On the other hand, many commenters objected to the withdrawal of NWP B. A number of commenters believe that the Corps did not consider all comments received in response to the July 1, 1998, **Federal Register** notice and that the decision to withdraw NWP B was premature. These commenters stated that the Corps should have announced its decision to withdraw NWP B when the other proposed NWPs are issued. Several of these commenters requested that the Corps provide documentation explaining this decision. Several commenters recommended that the Corps repropose NWP B.

We fully considered all comments received in response to the proposal to issue NWP B for master planned development activities. The decision to withdraw NWP B from the proposed

new and modified NWPs was discussed in the October 14, 1998, **Federal Register** notice, but we will provide further detail below.

One of the most important factors in the decision to withdraw NWP B is the difficulty in providing a clear, easy to understand, definition for the term "Master Planned Development," to be used in the context of the NWP. Without a clear definition of this term, there will be much confusion for the Corps and the regulated public concerning which developments could be authorized by this NWP. The comments received in response to the July 1, 1998, **Federal Register** notice provide ample evidence of the potential problems with implementing this NWP, because of the difficulty in producing a definition that is easily understood. Many commenters believe that any type of master planned development, particularly those approved by State or local agencies, would qualify for NWP B. This is simply an incorrect assumption which emphasized the difficulties in implementing this NWP. The intent of NWP B was to authorize developments that are designed, constructed, and managed to conserve the functions and values of waters of the United States on the project site. For these developments, the aquatic environment receives equal consideration to the development, and the development is designed to protect the local aquatic environment. We may repropose NWP B when we have formulated a definition that better supports the intent of the NWP and have resolved other concerns associated with the proposed NWP.

Limiting the Use of NWPs Within the 100-Year Floodplain

In the October 14, 1998, **Federal Register**, we proposed to prohibit the use of the new and modified NWPs to authorize permanent, above-grade wetland fills in the 100-year floodplain as mapped by the Federal Emergency Management Agency (FEMA) on its Flood Insurance Rate Maps. We also requested comments regarding the applicability of this restriction to existing NWPs, as well as the proposed new and modified NWPs.

Nearly all of the correspondence received in response to the October 14, 1998, **Federal Register** notice commented on this proposed restriction. Most of the proponents stated that the restriction should be expanded to apply to all 100-year floodplains, not just the 100-year floodplains mapped by FEMA, because further restriction is necessary to safeguard wetlands for protection against floods. One commenter said that the condition should be expanded to

include riparian buffers of 300 feet from all rivers and streams and should address any uses of NWPs in these areas, not merely above-grade fills in waters of the United States. A few of the commenters recommended specific NWPs to be included in this condition. Collectively, every NWP was recommended for inclusion. Many commenters objecting to the proposed restriction included State and local flood control agencies that voiced their concern that essential public facilities may need to be sited within the floodplain in order to properly function. They stated that all municipalities need the ability to build and maintain their urban drainage infrastructure without undue delay and expense so that it operates as originally designed for flood control and/or water quality enhancement purposes. Specifically, they said that the use of NWPs 3 and 31 to maintain these facilities should be exempt from this condition.

We are proposing to add General Condition 27 to the NWPs to restrict or prohibit the use of NWPs 12, 14, 21, 29, 39, 40, 42, 43, and 44 to authorize permanent, above-grade fills in waters of the United States within the 100-year floodplain. For these NWPs, prospective permittees must notify the District Engineer in accordance with General Condition 13. For NWPs 21, 29, 39, 40, 42, 43, and 44, the notification must include documentation that the proposed project will not involve discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills in waters of the United States within the FEMA-mapped 100-year floodplain. If the FEMA map is out of date or the 100-year floodplain is not mapped, the documentation should be from the local floodplain authority. This general condition is not restricted to 100-year floodplains mapped by FEMA on its Flood Insurance Rate Maps. Instead, this general condition would apply to all 100-year floodplains, except in 100-year floodplains at the point in the watershed where the drainage area is less than 1 square mile. In those areas where no FEMA maps exist, or the FEMA maps are out-of-date, the prospective permittee must submit documentation to the District Engineer from the local official with authority to issue development permits for activities in the 100-year floodplain that the proposed work is outside of the 100-year floodplain.

Proposed General Condition 27 also contains a presumption that NWP 12 and 14 activities resulting in permanent, above-grade fills in waters of the United States within the 100-year floodplain

will cause more than minimal adverse effects. However, this presumption is rebuttable and the proposed work can be authorized by NWP 12 or 14 if the prospective permittee clearly demonstrates to the District Engineer that the proposed work and associated mitigation will not decrease the flood-holding capacity of the waterbody and will not cause more than minimal changes to the hydrology, flow regime, or volume of waters associated with the 100-year floodplain. The documentation rebutting this presumption must include proof that FEMA, or a state or local floodplain authority through a licensed professional engineer, has approved the proposed project and provided a statement that the project does not increase flooding or more than minimally alter floodplain hydrology or flow regimes.

Expanding proposed General Condition 27 to prohibit the use of all NWPs within the 100-year floodplain, regardless of whether or not the authorized activity would result in above-grade wetland fills, would unnecessarily prohibit NWP activities that have little or no effect on floodplain functions or values. While a 300-foot buffer may be within the 100-year floodplain of some waterbodies, this would be an excessive requirement for waterbodies with narrow floodplains. We believe that certain NWP activities which result in permanent, above-grade fills in waters of the United States within the 100-year floodplain have the potential to impact water quality, especially during flood events, and therefore should be subject to the restrictions of this condition. We concur with the flood control agencies contentions that municipalities need the ability to build and maintain their urban drainage infrastructure without undue delay and expense so that those facilities operate as originally designed for flood control and/or water quality enhancement purposes. Lacking general support for including the existing NWPs in this proposed condition, and acknowledging that not all activities authorized by the existing NWPs will result in more than minimal adverse effects to 100-year floodplains, we are proposing to include NWPs 12, 14, 21, 29, and 40 in General Condition 27, as well as NWPs 39, 42, 43, and 44. Furthermore, we have determined that the proposed NWP 41, which authorizes reshaping existing drainage ditches, would not result in any appreciable adverse impacts to the floodplain and are proposing to exclude this NWP from General Condition 27.

Many commenters stated that FEMA maps are inaccurate and incomplete,

mapping mostly urban areas and leaving rural areas unprotected. Others were concerned about what information will be used to determine whether a project is within the 100-year floodplain. Many commenters also stated that the condition will result in greatly increased numbers of individual permits and that the area of land encompassed by the 100-year floodplain prohibition is so extensive as to make use of NWPs with this condition extremely prohibitive. Additionally, the Corps has provided no evidence to support their notion that use of any particular NWP to authorize fills in floodplains has contributed to, or threatens to contribute to, the frequency or severity of flood events. They state the burden is on the Corps to develop a factual record to justify its proposed regulatory actions.

FEMA maps are available for review at local FEMA or Corps offices for determining the applicability of this condition to the applicant's proposed project. We agree that applying General Condition 27 to NWPs 12, 14, 21, 29, 39, 40, 42, 43, and 44, will significantly increase the number of individual permit applications processed by the Corps. Additionally, we have determined that this condition covers approximately 55 million acres of wetlands which fall within the 100-year floodplain, a large amount of wetlands regulated under Section 404 of the Clean Water Act.

In response to the July 1, 1998, **Federal Register** notice, FEMA provided the following comments: (1) the replacement NWPs cover a much greater geographical area than the existing NWP 26 and therefore need to consider project impacts within the 100-year floodplain; (2) when flood capacity within the floodplain is diminished due to authorized or unauthorized construction in wetland areas, flooding in other areas is likely to increase; and (3) it is the responsibility of the Corps under Executive Order 11988, entitled Floodplain Management, to evaluate all activities in or affecting floodplains. Based upon these premises, the Corps feels it is necessary to impose this condition on those specific NWPs, which could potentially impact the flood capacity of the floodplains.

Most of those opposed to the proposed general condition stated that it does not fulfill the congressional intent to implement a streamlined permitting process for activities resulting in minimal adverse environmental effects on the aquatic environment. They also state that the Corps is not authorized by Congress to become a regulatory authority with regards to controlling

floodplain activities. A large number of commenters stated that the condition provides for dual regulation of the 100-year floodplains, through the Corps and FEMA. These commenters said that floodplain management, which FEMA administers, and water quality management, administered by the Corps under Section 404 of the Clean Water Act, should be regulated separately. A couple of commenters stated that if FEMA wants to restrict construction in floodplains to reduce flood damage then they should do so under their own authority.

We believe that the proposed condition does fulfill the congressional intent inasmuch as the NWP process provides for a less rigorous review of proposed projects with decisions being rendered in a much more timely manner than the individual permit process. Also, conditioning the NWP fulfills the requirement to minimize adverse impacts to the aquatic environment. Additionally, in accordance with Executive Order 11988, the district engineers are directed to avoid authorizing floodplain developments whenever practicable alternatives exist outside of the floodplain. We believe that we are authorized to regulate waters of the United States for water quality management and many wetlands within the 100-year floodplain fall within the "adjacency clause." Therefore, wetlands in the 100-year floodplain are within the Corps regulatory jurisdiction. To reiterate, the Corps recognizes that it does not regulate any activity in the 100-year floodplain that does not occur within a water of the United States; these upland areas would be regulated by FEMA. It is not the intent of the Corps to duplicate FEMA and State and local flood control agencies, but rather to rely on these agencies to assert their jurisdiction to minimize impacts to aquatic resources within the 100-year floodplain.

Most of the commenters indicated that the proposed condition is overly restrictive, unnecessary, and causes the process to be burdensome to both Corps regulators and the taxpayers. These commenters also indicated that it is both expensive and time-consuming without providing commensurate benefits for wetlands. Many said the proposal is not warranted and obviated by the many environmentally protective conditions already in place, including State and local regulations. Many of the opponents included state and local transportation departments who indicated that this condition would prevent them from fulfilling their mandate of ensuring public safety and that widening roadways, some within

wetlands within the 100-year floodplain, is often required and the condition would put an unnecessary burden on their departments while delaying their projects. They recommended exempting NWP 14 from this condition. Few of the objectors recommended which specific NWPs, existing or proposed replacements, should be excluded from this condition. Collectively, every NWP was recommended for exclusion.

To reiterate, in accordance with Executive Order 11988, district engineers should avoid authorizing floodplain developments whenever practicable alternatives exist outside of the floodplain. The proposed General Condition 27 prohibits the use of certain NWP activities that could result in more than minimal adverse impacts to the aquatic environment, as well as the 100-year floodplain. We believe that, with proper planning, transportation departments will have ample time to attain a permit through the individual permit process without undue delays and excessive risks to public safety. In the event of a "wash-out" due to a storm event, NWP 3 can be used to repair public and private roadways.

Limiting the Use of the NWPs in Designated Critical Resource Waters

We proposed in the October 14, 1998, **Federal Register** notice, to limit the use of NWPs in critical resource waters designated by State or Federal agencies. Many of the comments we received addressed proposed restrictions on the applicability of the NWPs in critical resource waters. Most of those comments generally supported the adoption of such restrictions, and they focused on suggestions for defining critical resource waters. These suggestions advocated the inclusion of the following waters as critical resource waters: waters that have any kind of special value designation by Federal, State, or local governments; sensitive and specially valuable waters; habitat of endangered, threatened, or sensitive species; source waters for drinking water; groundwater recharge zones; rare and irreplaceable wetlands that cannot be mitigated with current technologies; and waters declared as impaired under Section 303(d) of the Clean Water Act. We have considered each of these recommendations, as discussed below.

Waters that have any kind of special value designation by Federal, State, or local governments: For waters that have received a Federal designation of special value, we agree that the use of NWPs should be restricted to the extent that their applicability is reasonably certain to jeopardize any essential functions

which confer the recognized special value to these waters. We are proposing to add a new NWP general condition (General Condition 25) to address the use of NWPs in designated critical resource waters. Proposed General Condition 25, entitled Designated Critical Resource Waters, prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in the following critical resource waters including wetlands adjacent to these waters: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally-listed threatened and endangered species, coral reefs, State natural heritage areas, or outstanding national resource waters officially designated by the State where those waters are located. Outstanding national resource waters and other waters having particular environmental or ecological significance must be officially designated through an official State process (e.g., adopted through regulatory or statutory processes, approved through State legislation, or designated by the Governor). In those circumstances where a waterbody has been designated by the State, the District Engineer will publish a public notice advising the public that such waters will be added to the list of designated critical resource waters. The District Engineer may, on his own, designate critical resource waters after notice and opportunity for public comment. For activities authorized by NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, proposed General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for any activity proposed in these designated critical resource waters, including adjacent wetlands. This general condition also prohibits discharges in designated critical habitat for Federally-listed endangered or threatened species unless the activity complies with General Condition 11 and the U.S. FWS or the NMFS has concurred in a determination of compliance with this condition.

We believe that special value designations promulgated solely by State or local agencies without the approval of the governor or State legislature are not appropriate bases for the imposition of restrictions on the use of these Federal permits. We believe that restrictions which are necessary to support the other State and local special value designations should be effected through relevant State and local processes.

Several commenters suggested that Wild and Scenic Rivers, blue-ribbon trout fisheries, and American Heritage Rivers were all examples of waters that have been designated as having special value, and that these particular categories of waters should be categorically excluded from NWP eligibility. Since there is no official Federal designation of any waters as blue-ribbon trout fisheries, we do not agree that these waters should be excluded from this Federal program. The NWP general conditions already impose restrictions on NWP eligibility in waters that are components of Wild and Scenic River Systems, and on any river officially designated by Congress as a "study river" for possible inclusion in such systems. Since this general condition imposes restrictions that achieve the goals of adequately protecting special values, and of maximizing NWP utility, we do not believe that further restriction is appropriate or necessary. American Heritage Rivers may be likely candidates for inclusion as critical resource waters but it is difficult to identify any possible adverse effect that would result from NWP eligibility in these waters. It is particularly difficult to identify such effects from a national perspective.

We believe that the imposition of any restriction imposed to protect Critical Resource Waters must be precise in its scope, in order to provide all reasonable and necessary protection of the factors conferring special value, without unnecessarily limiting the utility of the NWPs. Since we believe that these two goals are equally important, we have concluded that it would be too broad a restriction to eliminate the applicability of any NWP in special value waters without a prior Corps determination that the NWP in question posed some reasonable likelihood of adverse effect on the recognized special value. Our consideration of the comments received and our concern about undue restrictions on the NWPs, lead us to conclude that we are unable to make additional determinations from a national perspective. As a result, we believe that any such determination of other types of waters would most appropriately be made at the district or, in some cases, at the division level, and that as a practical matter, the necessity of further restriction to protect waters that have a Federal special value designation must be determined by the Corps district or division and implemented as regional conditions on the NWPs, as necessary.

Sensitive and specially valuable waters: There is no official Federal designation of any waters as sensitive or

specially valuable waters, therefore there is no Federal definition of such waters. We believe that the inclusion of such arbitrary terms in the definition of Critical Resource Waters would be counterproductive, and we do not agree that introduction of additional ambiguity is appropriate. We further believe that the use of any NWP in waters identified by the Corps, on a case-by-case basis, as having some particular sensitivity or special value that is susceptible to degradation by the activity authorized by the NWP, can be adequately protected by the Corps use of its discretionary authority to require an individual permit review, as necessary.

Habitat of endangered, threatened, or sensitive species: Federal protection for the critical habitat of Federally-listed threatened and endangered species is provided in all Corps permit actions through compliance with the requirements of the Endangered Species Act, with the regulations promulgated pursuant to that Act, and through NWP General Condition 11. General Condition 25 contains a provision stating that discharges are not authorized in designated critical habitat for Federally listed threatened or endangered species unless the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition. Since "sensitive species" is a term that is not defined in the Endangered Species Act or in any other applicable Federal law, we believe that including the habitat of such "sensitive species" would promote confusion rather than provide clarity in the definition of critical resource waters, and we do not believe that such inclusion is appropriate.

Source waters for drinking water: We do not believe that any of the activities authorized by the NWPs pose any inherent threat to drinking water or to the source waters for drinking water, but it may be possible for such adverse effects to occur in certain circumstances. However, we believe that the specification of all such source waters as critical resource waters would impose a restriction on the utility of the NWPs that is not warranted by the limited extent of potential adverse effects. In light of this, we believe it is more appropriate to rely on the Corps use of its discretionary authority, on a case-by-case basis, to ensure against adverse effects on drinking water.

Groundwater recharge zones: We agree that any activity that significantly impairs groundwater recharge functions of wetlands must be avoided. However, such significant impairment does not

inherently result from the kinds of activities authorized by the NWPs. As such, we believe that any restriction on the authorization of an activity should be based on the effects that are expected to occur as a result of a specifically proposed activity. Since we do not expect the majority of activities authorized by the NWPs to adversely affect groundwater recharge, we believe that our ability to assert discretionary authority to require an individual permit in lieu of any NWP, for cause, provides ample protection for groundwater recharge zones.

Rare and irreplaceable wetlands that cannot be mitigated with current technologies.

As with many of the other types of wetlands suggested for inclusion as critical resource waters, the term "rare and irreplaceable wetlands that cannot be mitigated with current technologies" is undefined, and the general nationwide specification of such wetlands as critical resource waters would be a continuing source of debate and, therefore, impractical. However, we acknowledge that many wetlands systems may qualify as "rare and irreplaceable" because of their location in the landscape of a particular region. We believe that such locally rare and irreplaceable wetlands are critical resource waters because of their local importance. We believe that as such wetlands are recognized by Corps district and division offices, the revocation of any NWP that poses a threat to these systems, or the imposition of regional conditions to avert such threats, should be considered.

Waters declared as impaired under Section 303(d) of the Clean Water Act: "Impaired waters," as defined in Section 303(d) of the Clean Water Act, are addressed as a separate issue in the next section of this **Federal Register** notice, and as such, we do not believe it is appropriate to include these waters in the definition of critical resource waters.

Proposed General Condition 25 prohibits the use of NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity in certain Federally- and State-designated critical resource waters, including wetlands adjacent to those waters, with the exceptions discussed above. For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required for activities in designated critical resource waters and adjacent wetlands, to allow the district engineer to determine if the proposed work will result in more than minimal adverse effects on those waters. Activities

authorized by the NWPs not listed in General Condition 25 would not be subject to these requirements. Corps districts may also consider the use of regional general permits for those activities prohibited by General Condition 25, if the District Engineer determines after public notice and opportunity for public comment that on a regional basis, such activities will not result in more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Limiting the Use of the NWPs in Impaired Waters

In the **Federal Register** notice published on October 14, 1998, we requested comments on restricting or prohibiting the use of the NWPs in impaired waters, including how to identify impaired waters for the purposes of the NWPs, and which NWPs should be subject to this limitation. We received a large number of comments supporting the proposed limitation and a large number of comments objecting to the proposed limitation.

Some commenters stated that the proposed exclusion should apply to the use of NWPs in all wetlands and other waters within the watersheds of impaired waters. Other commenters recommended that the use of NWPs should be excluded from wetlands or waters upstream or adjacent to impaired waters. Two commenters stated that NWPs should be excluded from use in wetlands in impaired waters, even if the historic loss of wetlands within the watershed is not the cause of impairment, because those wetlands are of high value in that watershed. In contrast, several other commenters agreed with the Corps proposal to restrict the use of NWPs only in those watersheds that are considered impaired as a result of historic wetland losses. These commenters recommended that the exclusion apply only to "State-designated impaired waters which are determined to be impaired as a result of the historic loss of wetlands." Several commenters supported the proposed exclusion, provided the restriction applies only to those projects that will result in further degradation of the waterbody based on the applicable 303(d) parameter; if the proposed work will have no effect on the 303(d) parameter, then the project could be authorized by NWP.

In the October 14, 1998, **Federal Register** notice, we stated that the impairment of certain open waters such as lakes, rivers, and streams is directly related to the historic loss of wetlands in the watershed. Although not

explicitly stated in the October 14, 1998, **Federal Register** notice, the intent of the proposal was to restrict the use of NWP in waterbodies that are impaired due to the loss of wetlands. This remains our intent, but we are also proposing to add several other causes of impairment that will be considered as part of the restriction. The additional causes of impairment include: nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, and turbidity. These additional sources of impairment may be related to activities regulated under Section 404 of the Clean Water Act. We are proposing to incorporate this restriction into the NWP program as General Condition 26, entitled Impaired Waters.

We believe that discharges of dredged or fill material into impaired waters of the United States and adjacent wetlands may cause further impairment of those waters. Proposed General Condition 26 prohibits the use of NWPs to authorize discharges resulting in the loss of greater than 1 acre of impaired waters of the United States, including wetlands adjacent to those waters, except for activities authorized by NWP 3. Activities authorized by NWP 3 that occur in impaired waters and adjacent wetlands require notification to the District Engineer in accordance with General Condition 13, who will determine if the proposed work will result in further impairment of the waterbody. For activities resulting in the loss of 1 acre or less of impaired waters of the United States, including adjacent wetlands, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the work authorized by NWP must not result in further impairment of the waterbody. The notification must include a statement from the permittee that clearly explains how the proposed work, excluding mitigation, will not further impair the waterbody. The District Engineer will determine if the prospective permittee has clearly demonstrated that the proposed work will not result in further impairment of the waterbody. For discharges resulting in the loss of greater than 1/4 acre of impaired waters, including adjacent wetlands, the District Engineer will coordinate with the State 401 agency in accordance with the procedures in paragraph (e) of General Condition 13. The District Engineer will consider any comments received from the State 401 agency to determine if the proposed work will not result in further

impairment of the listed waterbody. If the District Engineer determines that the proposed activity will not result in further impairment of the waterbody by providing additional inputs of the listed pollutant (i.e., nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and loss of wetlands), then the project can be authorized by NWP if it meets all of the other terms and conditions of the NWPs. If the District Engineer determines that the proposed activity will result in further impairment of the waterbody by contributing more of the listed pollutant to the impaired waterbody, then the project cannot be authorized by NWP and the project proponent must apply for authorization either through the individual permit process or obtain authorization through an appropriate regional general permit, if available.

For the purposes of this proposed general condition, impaired waters are those waters of the United States that have been identified by States or Tribes through the Clean Water Act Section 303(d) process as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic losses of wetlands. The Corps will defer to states to identify these waters under the Section 303(d) process, because states are responsible for implementing Section 303 of the Clean Water Act, specifically the Total Maximum Daily Load (TMDL) program overseen by EPA. TMDL standards must be approved by EPA after a formal public notice and comment period. States must submit lists of impaired waters to EPA every two years. The authorized activity itself can result in net improvement of the aquatic ecosystem. For example, NWP 13 can be used to authorize bank stabilization activities in a waterbody that has been identified as impaired due to sedimentation, because the bank stabilization activity reduces the amount of sediment entering the waterbody, thereby improving water quality. Compensatory mitigation can be used to offset losses of waters of the United States authorized by NWPs and reduce the sources of pollution causing impairment of the local aquatic environment. The establishment and maintenance of vegetated buffers adjacent to open and flowing waters is a type of compensatory mitigation than can help improve the impaired

waterbody by restoring aquatic habitat, removing nutrients from surface runoff and groundwater flowing into waterbodies, trapping sediments, and moderating changes in water temperatures.

Several commenters believe that the use of NWPs in impaired waters is a violation of the Clean Water Act and that individual permits must be used instead to authorize Section 404 activities. A number of commenters objected to the proposed exclusion because they believe that concerns for impaired waters should be addressed by states or Tribes under Sections 101(b) and 401 of the Clean Water Act. Several of these commenters stated that the proposed exclusion duplicates State efforts and is unnecessary for the NWP program, because states currently consider the effects of development projects on impaired rivers. A number of commenters expressed concern that excluding the use of NWPs from impaired waters will result in additional pressures on average quality waters.

The use of NWPs in impaired waters is not a violation of the Clean Water Act, particularly when a State, Tribe, or EPA issues a Section 401 water quality certification either for the NWP itself or for a case-specific NWP authorization. If the 401 agency determines that a project does not meet the water quality standards of the State or Tribe, resulting in further impairment of the waterbody, they can deny water quality certification for that particular activity. The requirements of proposed General Condition 26 will not place additional pressures on impaired waters, because most project proponents are unlikely to relocate their projects to areas adjacent to or in unimpaired waters. It is important to remember that NWPs are optional permits, and the project proponent can apply for authorization through the individual permit process if he or she cannot meet the terms and conditions of an NWP. They are much more likely to request an individual permit for a project rather than relocating the project to try to obtain an NWP authorization.

Many commenters objected to restricting or eliminating the use of NWPs in impaired waters. Reasons for their objections include: (1) Eliminating the use of NWPs in impaired waters is illogical and will not provide any environmental benefits; (2) the Corps does not explain how eliminating the use of NWPs in impaired waters will repair or fix the impairment; (3) no information is provided in the October 14, 1998, **Federal Register** notice to support that impairment is due to historic losses of wetlands in the

watershed, since few states have identified waters where the impairment is due to loss of wetlands; (4) historic wetland loss is an insignificant source of impairment for most waterbodies; (5) no clear definition of "impaired waters" was provided in the October 14, 1998, **Federal Register** notice; (6) many State Section 303(d) lists have not been approved by EPA; and (7) the Corps provided no justification for making this a Federal exclusion.

Restricting the use of NWP in waters that are impaired because of nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and historic losses of wetlands in the watershed will benefit the local aquatic environment by preventing additional impairment of the waterbody and improving the waterbody through compensatory mitigation and best management practices. It is important to note that impaired waters are identified by evaluating open waters and segments of streams and rivers, not the entire watershed. Proposed General Condition 26 will apply only to those waterbodies, or segments of waterbodies, that have been assessed by states under the TMDL program. In addition, proposed General Condition 26 will apply only to wetlands adjacent to those waterbodies or segments of waterbodies. The Corps will not identify impaired waterbodies. As more waterbodies are surveyed by states under the TMDL program, there may be additional waters subject to General Condition 26. In the October 14, 1998, **Federal Register** notice, we requested suggestions for identifying impaired waters, and cited the Section 303(d) process as an example. Based on the comments received in response to the October 14, 1998, **Federal Register** notice, we have determined that the Section 303(d) program is the most appropriate way to identify impaired waters. We can add the requirements of proposed General Condition 26 to the NWP program because those requirements are directly related to the goals of the Clean Water Act.

A couple of commenters questioned how the Corps will define the phrase "identified with waters and aquifers that have been identified by states as impaired," and asked if stream flow data, hydrologic data, or geographic proximity will be used as criteria.

Some commenters said there is no indication as to the number of waters that are impaired due to activities authorized by NWPs. Many commenters objected to the proposed exclusion, stating that it would substantially

reduce the amount of geographic area where NWPs could be used. Several of these commenters stated that the proposed exclusion would prohibit the use of NWPs in 36% of the rivers and 39% of the lakes in the United States. Because of the large amount of waters that are considered impaired through the Section 303(d) process, a number of commenters stated that prohibiting the use of NWPs in impaired waters will result in a substantial increase in the number of individual permits processed by the Corps, increasing its workload.

Since proposed General Condition 26 will apply only to activities in waterbodies (and wetlands adjacent to those waterbodies) that are identified by State Section 303(d) programs as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and historic losses of wetlands in the watershed, and the proposed general condition requires that the NWP activity cannot further impair the waterbody, the number of activities for which the NWPs cannot be used is not likely to be substantial. Therefore, we anticipate only a relatively minor increase in the number of activities requiring individual permits as a result of proposed General Condition 26. According to EPA's "National Summary of Water Quality Conditions" for 1996, only 19% of the river and stream miles in the United States have been surveyed for TMDLs. For other waterbodies, 40% of the lakes, ponds and reservoirs and 72% of the square miles of estuaries have been surveyed for TMDLs. Of the river miles surveyed, 18% are impaired due to siltation, 14% are impaired due to nutrients, 10% are impaired due to oxygen depleting substances, 7% are impaired due to habitat alteration, and 7% are impaired due to suspended solids. Of the pond, lake, and reservoir acres surveyed, 20% are impaired due to nutrients, 10% are impaired due to siltation, 8% are impaired due to oxygen-depleting substances, and 5% are impaired due to suspended solids. For ponds, lakes, and reservoirs, habitat alteration was not listed as a source of impairment in the 1996 EPA report cited above. Of the square miles of estuaries surveyed, 22% are impaired due to nutrients, 12% are impaired due to oxygen-depleting substances, and 6% are impaired due to habitat alterations. There may be some overlap in these percentages, because more than one pollutant may impair a particular waterbody or river segment. If, in the

future, states identify, through the Section 303(d) process, additional waters as impaired due to the causes listed in proposed General Condition 26, then those waters and any adjacent wetlands will be subject to this general condition.

A few commenters objected to the reference to aquifers in the October 14, 1998, **Federal Register** notice. Some of these commenters stated that Section 404 of the Clean Water Act does not provide the Corps with the authority to regulate groundwater. They said that regulation of groundwater should be left to the states, who have the legal authority. Other commenters requested guidance or definitions to identify impaired aquifers.

We agree that Section 404 of the Clean Water Act does not provide us with the authority to directly regulate activities that affect groundwater, but since the quality of groundwater is often affected by activities in surface waters, we can consider the adverse effects of work authorized under Section 404 on water supplies.

Many commenters discussed potential problems with the proposed limitation, especially if the Section 303(d) process is used to identify impaired waters for the purposes of the proposed exclusion. A large number of commenters stated that waters included on the Section 303(d) lists for specific water quality criteria are not necessarily affected by activities regulated under Section 404 of the Clean Water Act. Many commenters recommended that the proposed exclusion should not apply to waters that are considered impaired due to toxic discharges, nutrient runoff, organic pollutants, fecal coliform, and sediment loads. Another commenter objected to the proposed exclusion because impairment of waters may be due to activities outside of the watershed and not directly in the impaired waterbody. A couple of commenters objected to using the Section 303(d) process to identify impaired waters because EPA is currently attempting to refine the entire Section 303(d) program and is planning to issue proposed rules and guidance with specific requirements for developing Section 303(d) lists. Another objection is that the Section 303(d) lists are subject to review every two years, which may result in uncertainty for the regulated public. Some commenters oppose the use of Section 303(d) lists because a state often uses only one data point to make a Section 303(d) determination and the criteria are often applied inconsistently between states. Some State lists are better developed

than others, resulting in inconsistent standards between states.

The impairment of waterbodies due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic loss of wetlands, may be related to activities regulated under Section 404 of the Clean Water Act. The requirements of General Condition 26 will ensure that the activities authorized by NWP will not result in further impairment of the waterbody, so that the NWPs will authorize only activities with minimal adverse effects on the aquatic environment. Impairment due to other causes, such as metals, toxic discharges, organic pollutants, and fecal coliform, will not be subject to this general condition. We recognize that the Section 303(d) lists are subject to change every 2 years and that many waters have not been surveyed to determine if they comply with State TMDL criteria. If additional waters are identified as impaired due to the causes listed in General Condition 26, then they will be subject to that general condition. We also recognize that there may be some inconsistencies between states, but these inconsistencies should be resolved by EPA, which provides Federal oversight for the Section 303(d) program and its implementation by states.

A number of commenters proposed alternatives to prohibiting the use of NWPs in impaired waters. Several commenters stated that concerns for impaired waters should be addressed through either regional conditions, case-specific discretionary authority, or revocation of certain NWPs in specific geographic areas. Other commenters suggested addressing concerns for impaired waters in the same way that the Corps addresses endangered species and historic property issues, by adding a general condition to the NWPs requiring notification to the District Engineer for activities that affect impaired waters and allowing the District Engineer to determine if the proposed activity will result in further impairment of the waterbody. If the proposed work would result in no further impairment of the waterbody, then the activity could be authorized by NWP. Another commenter suggested that compensatory mitigation could be required for NWP activities to replace lost wetlands and increase the acreage of wetlands in the vicinity of the impaired waterbody. A few commenters recommended allowing the use of NWPs in impaired waters where the authorized activity does not result in a permanent loss of pollution control

features or does not cause permanent adverse effects to water quality, citing as examples stream restoration projects, utility line backfills, and temporary impacts to waters of the United States. Another commenter stated that the use of NWPs in impaired waters should not be restricted or prohibited when the objective of the proposed work is to restore wetlands, aquatic habitat, or water quality, or to conduct activities that will remove the waterbody from the Section 303(d) list.

We agree that an NWP general condition addressing the use of NWPs in waterbodies designated, through the Section 303(d) process, as impaired due to nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, and the historic loss of wetlands is appropriate. Proposed General Condition 26 requires that activities authorized by NWPs in impaired waterbodies and adjacent wetlands will not result in further impairment of the waterbody. Compensatory mitigation, if required to ensure that the authorized work results in minimal adverse effects on the aquatic environment, should also help reduce inputs of the pollutants that are causing the impairment. Such compensatory mitigation may include: offsetting the authorized loss of wetlands, establishing and maintaining a vegetated buffer that reduces the input of nutrients, organic matter, and sediments into the waterbody, and reestablishing aquatic habitat adjacent to the waterbody. NWP activities that restore or enhance impaired waters are not prohibited by proposed General Condition 26.

In response to the October 14, 1998, **Federal Register** notice, we received many suggestions for NWPs that should not be subject to the proposed exclusion. Some commenters cited specific types of activities that should not be prohibited from NWP authorization in impaired waters. One commenter suggested that the exclusion should not apply to the maintenance of transportation projects. Other commenters suggested that flood control activities and the maintenance of flood control projects should be exempt from this exclusion. Some commenters said that the exclusion should apply only to those NWP activities that have a direct effect on a Section 303(d) parameter.

We believe that proposed General Condition 26 should apply to all NWPs that authorize discharges of dredged or fill material into waters of the United States identified as impaired due to the

causes listed in the general condition. Proposed activities that result in further impairment of the listed waterbody or result in the loss of greater than 1 acre of impaired waters and adjacent wetlands (except for activities authorized by NWP 3 as discussed above) are not authorized by NWPs. Prospective permittees are required to notify the District Engineer in accordance with General Condition 13, and the District Engineer will determine whether or not proposed work will result in further impairment of the waterbody. For proposed activities resulting in the loss of greater than 1/4 acre of impaired waters and adjacent wetlands, the District Engineer will coordinate with the State 401 agency in accordance with paragraph (e) of General Condition 13. Proposed General Condition 26 does not apply to activities in impaired waters that are subject only to Section 10 of the Rivers and Harbors Act, if there is no related Section 404 activity. Maintenance activities for transportation projects and flood control projects that do not result in discharges of dredged or fill material are not subject to the requirements of proposed General Condition 26.

III. Comments and Responses on Specific Nationwide Permits

3. Maintenance

In the July 1, 1998, **Federal Register** notice, the Corps proposed to modify this NWP to authorize the removal of accumulated sediments in the vicinity of existing structures. We also proposed to authorize activities in waters of the United States associated with the restoration of uplands lost as a result of a storm, flood, or other specific event. These additional activities are authorized by paragraphs (ii) and (iii) of the NWP.

General Comments on this NWP: The original terms and conditions of NWP 3 are in paragraph (i) of this NWP. In the July 1, 1998, **Federal Register** notice, we proposed minor changes to the original text of NWP 3. In the July 1, 1998, **Federal Register** notice, we proposed to add a notification requirement for all work authorized by paragraph (i) of the proposed modification of NWP 3 except for the replacement of the structure. We also inserted the phrase "or damaged" after the word "destroyed." We also received some comments concerning the provisions of NWP 3 as published in the December 13, 1996, issue of the **Federal Register** (61 FR 65874-65922).

Some commenters recommended removing the PCN requirement from paragraph (i) whereas other commenters suggested modifying the NWP to require

PCNs for all activities authorized by NWP 3. Many commenters stated that a replacement project generally results in greater impacts than repair and rehabilitation activities, but notification should be required only if the repair and rehabilitation activity exceeds the "minor deviations in the structure's configuration or filled area" provision of the NWP. One commenter stated that it was unclear whether repair and rehabilitation activities require notification. We have removed the PCN requirement from paragraph (i) of this NWP, since we do not believe it is necessary to require notification for the repair, replacement, or rehabilitation of a previously authorized structure or fill.

Two commenters suggested that the definition of the phrase "minor deviations in the structure's configuration" should be made more compatible with modern design standards and another suggested that the definition of "currently serviceable" should be expanded to cover all structures which have been destroyed in a catastrophic event, such as a hurricane.

This NWP authorizes repair, rehabilitation, and replacement activities with minor deviations necessary to comply with modern design standards. Previously authorized structures or fills that have been damaged by catastrophic events can also be repaired, rehabilitated, or replaced under this NWP. We do not need to change the definition of the term "currently serviceable."

General comments addressing this NWP include: (1) Prohibiting its use in watersheds with substantial historic aquatic resource losses; (2) prohibiting its use in regionally identified tidal waters to ensure effective protection of their unique and difficult to replace functions; (3) prohibiting its use in certain stream segments to ensure minimal cumulative adverse effects; (4) prohibiting its use in watersheds identified as having water quality problems; and (5) requiring the permittee to perform the work during low flow conditions.

We believe that these restrictions are unnecessary since NWP 3 authorizes maintenance activities, which are unlikely to result in more than minimal adverse effects on the aquatic environment. However, division engineers can regionally condition NWP 3 to restrict or prohibit its use in high value waters. Division engineers can also regionally condition NWP 3 to reduce the distance from the existing structure that accumulated sediment can be removed or reduce the amount of fill that can be discharged into waters of

the United States for activities associated with the repair of uplands damaged as a result of storms or other discrete events.

Many commenters suggested additional conditions, which would allow minor deviations necessary to incorporate best management practices. Again, this is the intent of the phrase "minor deviations in the structure's configuration or filled area" in paragraph (i). It was also suggested that the repair and installation of scour and bank protection should be included in the NWP, as long as the applicant provides documentation of the original construction, including but not limited to, "as-built" plans. Another suggested activity to be added to NWP 3 was the removal of beaver dams and associated debris to restore the "natural" hydrology or functions of an area.

Paragraph (ii) of the proposed modification of NWP 3 authorizes the installation of scour protection necessary to protect or ensure the safety of the structure. If bank protection is necessary, it may be authorized by NWP 13, a regional general permit, or an individual permit. The removal of a beaver dam may or may not require a Section 404 permit, depending on whether the removal of the beaver dam results in a discharge of dredged or fill material into waters of the United States. If the beaver dam can be removed without any discharges into waters of the United States or the discharge consists only of incidental fallback, no Section 404 permit is required. If the removal of the beaver dam involves discharges into waters of the United States, then a Section 404 permit is required. If a Section 404 permit is required, the removal of a beaver dam may be authorized by another NWP such as NWP 18, a regional general permit, or an individual permit.

Removal of Accumulated Sediments in the Vicinity of Existing Structures: A large number of commenters recommended limits for paragraph (ii) of NWP 3. Recommended limits ranged from 20 to 300 cubic yards of excavated material and 25 to 500 linear feet of direct impacts upstream and/or downstream of the structure. The commenters recommending lower limits believe that higher limits for this NWP would cause more than minimal adverse effects on the aquatic environment. The commenters suggesting higher limits contend that higher limits are necessary to authorize sediment removal when accumulation of sediments occurs for greater distances (e.g., in flat terrain or alluvial out-wash areas). Another commenter recommended imposing 1/3-

acre and 200 linear foot limits in paragraph (ii) if the project is in woodlands or special aquatic sites. Several commenters believe that there should be no restrictions because review of the PCN allows the District Engineer to limit the work to the minimum necessary to maintain the function of the structure. One commenter stated that the NWP should be conditioned to prohibit stream bed "clean-outs." Another commenter requested a narrower definition of the term "vicinity."

We believe that the 200 linear foot limit authorizes removal of accumulated sediments from the vicinity of an existing structure that, under most circumstances, results only in minimal adverse effects on the aquatic environment, individually or cumulatively. Division engineers can regionally condition this NWP to decrease the 200-foot limit or impose limits on the quantity of excavated material that can be removed. Since paragraph (ii) of the proposed modification of NWP 3 requires notification to the District Engineer for every activity, district engineers can exercise discretionary authority and require an individual permit for those activities that result in more than minimal adverse effects on the aquatic environment. Paragraph (ii) of the proposed modification does not authorize stream "clean out" activities, unless sediments have accumulated in the vicinity of an existing structure, such as a bridge or culvert. Sediment removal to deepen a stream channel is not authorized by this NWP. District engineers will determine what constitutes the "vicinity" for the purposes of paragraph (ii) of this NWP.

One commenter recommended that the NWP prohibit the removal of accumulated sediments in special aquatic sites. Another commenter stated that compensatory mitigation should be required if aquatic habitat is removed. Some commenters suggested modifying paragraph (ii) to authorize the removal of sediment deposits and associated vegetation from the structures themselves and require testing of sediments in areas of suspected contamination to ensure that the adverse effects of the work are minimal.

We do not believe that it is necessary to exclude special aquatic sites from paragraph (ii) of the proposed modification of NWP 3. Sediment accumulation can occur in riffle and pool complexes and can also result in vegetated bars which may be considered wetlands. However, these areas are constantly changing due to sediment transport within the waterbody. Under

these circumstances, the removal of accumulated sediments, even if they are vegetated, typically results in minimal adverse effects on the aquatic environment. District engineers can require compensatory mitigation, if they believe it is necessary to ensure that the authorized work results only in minimal adverse effects, but in most situations compensatory mitigation is unnecessary due to the dynamic nature of the affected area and the minor impacts to the aquatic environment. In fact, removal of accumulated sediments in the vicinity of structures may improve the aquatic environment by removing barriers to fish passage. It is likely that sediments will repeatedly accumulate in the area and will have to be removed on a regular basis. The phrase "in the vicinity of existing structures" includes removal of accumulated sediments, including any vegetation that may be growing on those accumulated sediments, in and near the structures. However, we will clarify the phrase to read "* * * in the vicinity of, and within, existing structures * * *" In areas where accumulated sediments may be contaminated, district engineers can exercise discretionary authority to require an individual permit and require testing to determine if special techniques are required for the excavation and disposal of the accumulated sediment.

Some commenters objected to modifying this NWP to authorize sediment removal in the vicinity of existing structures, especially in docking areas. One commenter requested that the NWP include a definition of the term "structure" to clarify whether or not maintenance dredging of marina basins and boat slips is authorized by this NWP. One commenter suggested that the provision for removing accumulated sediment in front of existing structures appears to conflict with the prohibition against maintenance dredging in paragraph (i) of the proposed modification to this NWP. Several commenters also recommended that the Corps limit the number of times this permit could be used to prevent the cumulative impacts of multiple sediment removal projects. One commenter stated that removal of sediment from a drainage ditch in the vicinity of an existing structure would be considered maintenance of an existing drainage ditch and would be exempt from Section 404 permit requirements in accordance with 33 CFR Part 323.4(a)(3).

We have changed the text of the proposed modification of NWP 3 to clarify that maintenance dredging for the primary purpose of navigation is not

authorized by this NWP, unless it is specifically authorized by paragraphs (ii) and (iii) of the NWP for other purposes. For example, this NWP can authorize the removal of accumulated sediment from a water intake structure in a marina basin. Maintenance dredging of existing marina basins or boat slips may be authorized by NWP 35, NWP 19, regional general permits, or individual permits. We believe that it is unnecessary to limit the number of times this NWP can be used to remove accumulated sediments in the vicinity of existing structures. The removal of accumulated sediments in the vicinity of existing structures is unlikely to result in more than minimal cumulative adverse effects on the aquatic environment. District engineers can determine, through their review of notifications, if repeated removal of accumulated sediments at a particular site results in more than minimal cumulative adverse effects on the aquatic environment. For the purposes of this NWP, the term "structure" does not include unconfined waterways and channelized streams, except where the channelized stream consists of a concrete-lined channel. Although the maintenance of existing drainage ditches is exempt under Section 404(f), paragraph (ii) of NWP 3 authorizes the removal of accumulated sediments in the vicinity of existing structures that does not qualify for a Section 404(f) exemption. Maintenance activities that are eligible for Section 404(f) exemptions do not require the use of this NWP.

Some commenters stated that the placement of rip rap to protect the structure should be removed from this NWP because this activity can be authorized by other NWPs. One commenter believes that the placement of rip rap should not be authorized by this NWP except in areas where it is clearly necessary to protect public structures. Other commenters recommended prohibiting the placement of rip rap in areas inhabited by submerged aquatic vegetation.

It is our intent to authorize under paragraph (ii) all related activities for a single and complete project that have minimal adverse effects on the aquatic environment, rather than require the use of multiple NWPs to authorize those activities. The placement of rip rap at the foot of the structure is often necessary to protect the structure from scour. If sediments are accumulating in the vicinity of the structure, it is likely that the structure is subject to scouring by the sediment load of the waterbody. In areas with substantial movement of sediment, it is unlikely that large

populations of submerged aquatic vegetation will become established, because the movement of sediments in the bed of the waterbody often will not allow submerged aquatic vegetation to take root and grow in the waterbody. Furthermore, the PCN requirement in paragraph (ii) allows district engineers to review all proposed removal of accumulated sediments to ensure that the adverse effects on the aquatic environment are minimal. If a substantial population of submerged aquatic vegetation inhabits the vicinity of the structure, district engineers can exercise discretionary authority if the adverse effects of sediment removal and the placement of rip rap will be more than minimal.

Some commenters stated that the removal of accumulated sediments from publicly-owned transportation facilities should be exempt from notification requirements, and no PCN should be required for sediment removal after heavy storms or floods, because it is too time consuming to obtain the required cultural and biological clearances.

We believe that the adverse effects on the aquatic environment are the same, regardless of whether or not a transportation crossing is privately or publicly owned. The PCN requirement is necessary to allow district engineers to determine if the adverse effects of the proposed work on the aquatic environment will be minimal and ensure that prospective permittees will not remove more sediment than necessary. In the event of a heavy storm, flood, or other natural disaster, the Corps has emergency procedures in place for expediting permit issuance for activities related to repairing storm or disaster damage.

Some commenters recommended authorizing the use of minor cofferdam systems in the NWP, without a PCN requirement, when removing accumulated sediments and debris in accordance with paragraph (ii) and for activities in waters of the United States associated with restoring damaged uplands in paragraph (iii).

We disagree that this NWP should include the use of cofferdams, because NWP 33 can be used to authorize temporary construction, access, and dewatering activities that may be associated with the activities authorized by this NWP. Combining NWP 3 with NWP 33 for a single and complete project is not contrary to General Condition 15, provided the adverse effects on the aquatic environment are minimal.

Activities Associated with Restoration of Uplands: Paragraph (iii) of the proposed modification of NWP 3

authorizes discharges of dredged or fill material into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event. Many commenters stated that the restoration of uplands should be removed entirely from this NWP because it has nothing to do with the maintenance of currently serviceable structures and the Corps does not have jurisdiction over any activity in uplands. Many of these commenters believe that the Corps is asserting jurisdiction over uplands and requested the removal of paragraph (iii) from NWP 3. One commenter suggested that instead of authorizing the project proponent to rebuild an upland area to "pre-event" conditions, the permittee should only be authorized to stabilize the remaining uplands. Another commenter objected to modifying NWP 3 to authorize the restoration of eroded banks because bank erosion is a natural process and there are no limits in the NWP. This commenter believes that an individual permit should be required, with conditions requiring the use of coarse woody debris or other bioengineering methods to prevent further erosion of the bank.

The purpose of paragraph (iii) of this NWP is to authorize those activities in waters of the United States that are associated with the restoration of uplands damaged by a storm or other discrete event. The restoration of uplands lost as a result of a discrete natural event does not require a Section 404 permit, because that activity is subject to the Clean Water Act Section 404(f) exemptions. However, some work in waters of the United States may be necessary to complete the restoration work. It is this associated work in waters of the United States that is authorized by this NWP. For example, the permittee may want to install structures to protect the restored uplands or remove obstructions in waters of the United States in the vicinity of the affected uplands. Through paragraph (iii) of this NWP, we are not attempting to regulate activities in uplands. We agree that paragraph (iii) requires clarification as to the extent of the Corps jurisdiction for upland restoration activities and we have rewritten paragraph (iii) to state that NWP 3 authorizes discharges " * * * into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event * * * ". Paragraph (iii) of the proposed modification does not authorize activities in waters of the United States

associated with the replacement of uplands lost through gradual erosion processes; the loss of uplands must be due to a specific event, such as a hurricane or flood. Permittees are encouraged, but not required, to utilize bioengineering methods to stabilize the restored bank.

One commenter objected to the proposed paragraph (iii) of the NWP, stating that previous conditions of the site are too difficult to document. Some commenters recommended that the Corps require the use of field evidence to estimate the prior extent of uplands, such as contours adjacent to the damaged areas, or as-built plans for the waterway to determine the extent of activities authorized by this NWP. Two commenters suggested that paragraph (iii) of NWP 3 should be applicable for smaller events over a specific time period (e.g., one year) rather than one catastrophic event.

We have made the requirement for the prospective permittee to provide evidence to the District Engineer to justify the extent of the proposed restoration less stringent, to allow the District Engineer more flexibility to determine if a proposed activity can be authorized by paragraph (iii) of this NWP. Evidence of the pre-event extent of uplands can be provided by a recent topographic survey or photographic evidence. District engineers may also assess the surrounding landscape, including field evidence, to evaluate the extent of the proposed restoration and determine if it complies with the NWP. The location of the ordinary high water mark that existed prior to the storm event may be obvious when visiting the site. We realize that most property owners will not have a recent topographic survey showing the extent of the uplands on their property.

Paragraph (iii) of the proposed modification of NWP 3 specifically does not authorize the reclamation of lands lost over an extended period of time due to normal erosion processes. If the land is subject to normal erosion processes, the landowner can prevent or reduce further erosion through bank stabilization measures, many of which are authorized by NWP 13. If the proposed bank stabilization measure does not qualify for authorization under NWP 13, then the landowner can apply for authorization by another NWP, a regional general permit, or an individual permit. We will retain the provision of the NWP to authorize only activities in waters of the United States for restoration of uplands lost due to specific events, such as storms and floods, and specifically exclude lands lost through normal erosion processes.

For paragraph (iii) of the NWP, PCN thresholds of 1/4 acre, 10 cubic yards, and up to 200 linear feet of stream bed were suggested by commenters and some commenters recommended requiring notification only for activities in special aquatic sites. One commenter recommended notification and agency coordination for all activities authorized under paragraph (iii).

In the July 1, 1998, proposal to modify NWP 3, there was an inconsistency in the notification requirements. In subparagraph (c) of the proposed modification, notification was required for activities affecting greater than 1/3 acre of waters of the United States. Subparagraph (e) of the proposed modification stated that notification is required for all activities associated with the restoration of uplands. We have determined that notification should be required for all activities authorized under paragraph (iii) of this NWP, and have modified the NWP to state that notification is required for all activities authorized by paragraph (iii) of NWP 3.

One commenter suggested that the Corps reduce the amount of time required to submit a PCN from one year after the date of the damage to two or three months. They believe that two or three months is sufficient time for the landowner to realize that damage to uplands has occurred due to a discrete event and determine if restoration of the uplands will be done by the property owner. Another commenter suggested that while a 12-month time limit after the damage event may be enough time to plan restoration, it does not provide enough time to obtain financing for the restoration effort. Some commenters recommended requiring compensatory mitigation at a 1:1 ratio for activities authorized by paragraph (iii) of this NWP.

Although landowners are usually immediately aware that they have lost uplands due to a storm, flood, or other discrete event, we believe that they should be allowed one year to determine if they want to restore the lost uplands and submit a notification to the District Engineer. After a catastrophic event, many landowners require time to recover from the event and conduct repairs to their homes and other structures. Restoration of their land is often less urgent and the landowners should be allowed adequate time to carefully plan their upland restoration efforts. It should also be noted that the one year deadline in paragraph (iii) of the NWP applies only to the notification requirement and that the permittee has two years to start the restoration work or execute a construction contract. Two

years should be an adequate amount of time to conduct the upland restoration activity.

Since the purpose of paragraph (iii) is to authorize activities in waters of the United States associated with the restoration of uplands lost due to a storm event, in most cases compensatory mitigation should not be required because the purpose of the work is to return the area to approximately the same conditions that existed prior to the storm event. Activities in waters of the United States associated with the restoration of uplands typically do not result in more than minimal adverse effects on the aquatic environment and should not require compensatory mitigation. Carefully planned and implemented restoration efforts may benefit the overall aquatic environment by repairing the damaged areas and reducing sediment loads to the waterbody, thereby improving water quality. As with all NWP, district engineers may require compensatory mitigation to ensure that the adverse effects of the work on the aquatic environment are minimal, but we believe that compensatory mitigation should not be required in most cases.

To make NWP 3 easier to understand, we are proposing to combine all of the conditions in subparagraphs (a) through (e) and subparagraph (h) of paragraph (iii) to form a single paragraph. We have also added a note at the end of this NWP to clarify that NWP 3 authorizes repair, rehabilitation, or replacement activities that do not qualify for the Section 404(f) exemption for maintenance.

This NWP is subject to the requirements of proposed General Conditions 25 and 26. General Condition 25 requires the prospective permittee to notify the District Engineer in accordance with General Condition 13 for activities in designated critical resource waters, including wetlands adjacent to those waters. The District Engineer may authorize NWP 3 activities in designated critical resource waters and adjacent wetlands if the adverse effects on the aquatic environment are no more than minimal. General Condition 26 does not prohibit the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. However, NWP 3 activities in impaired waters and adjacent wetlands require notification to the District Engineer in accordance with General Condition 13. The proposed work can be authorized by NWP 3 if the permittee demonstrates to the District Engineer that the work will not result in further impairment of the waterbody.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. This NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

7. Outfall Structures and Maintenance

In the July 1, 1998, **Federal Register** notice, the Corps proposed to modify this NWP to authorize the removal of accumulated sediments from outfall and intake structures and associated canals. All of the original terms and limitations of NWP 7 have been retained. Numerous commenters expressed their support for the proposed modifications to NWP 7. A number of commenters objected to the inclusion of excavation activities in associated canals and impoundments and questioned whether such activities are related and similar in nature. A couple of commenters questioned the need for the proposed modification. Some commenters requested acreage and cubic yardage limits for the additional activities authorized by the proposed modification of NWP 7. Several commenters recommended restricting excavation in wetlands.

Outfalls, intakes, and associated canals accumulate sediment and require periodic excavation or maintenance dredging to restore flow capacities to the facility. Most of the dredging is required in the vicinity of intake structures and their canals because circulation patterns result in the deposition of sediment in these areas. This sediment must be removed to ensure that the facility has an adequate supply of water for its operations. Water discharged from outfall structures usually has little or no sediment load and maintenance dredging is not often required in these areas. In situations where a utility company's intake or outfall canal is also used by barges to travel to the utility facility, part (ii) of the proposed modification of NWP 7 will allow continued access by those barges because the removal of accumulated sediments will return the intake or outfall canal to its originally designed dimensions and restore its navigable capacity.

We believe that authorizing some dredging or excavation to maintain the effectiveness of the outfall or intake structure is necessary and an integral part of this NWP. This NWP is conditioned to authorize only the minimum work necessary to maintain the facility, and requires the prospective

permittee to provide the District Engineer with information on the design capacities and configuration of the intake or outfall structure, impoundment, or canal. The prospective permittee will also be required to submit a delineation of affected special aquatic sites with the PCN to allow district engineers to better assess potential adverse effects on the aquatic environment, especially in vegetated shallows that may occur in the canal or in the vicinity of the intake or outfall structure. No acreage limits have been placed upon this NWP. Most activities authorized by this NWP will take place in existing canals, which have been repeatedly dredged and maintained and often support some kind of industrial or commercial activity for public benefit. Furthermore, existing deposit areas for the dredged or excavated sediment will typically be present and available for use. Where maintenance dredging or excavation is proposed, notification is required and the District Engineer can exercise discretionary authority if the adverse effects on the aquatic environment will be more than minimal. Compensatory mitigation will also be required where appropriate, but in most cases we believe that compensatory mitigation should not be required for activities authorized by part (ii), since it is a maintenance activity. Division engineers can also impose regional conditions on this NWP to add limits to the NWP or restrict or prohibit its use in certain waterbodies.

Several commenters supported the proposed notification requirements. Several commenters recommended requiring notification for all activities whereas other commenters suggested specific distance and acreage thresholds for notification.

We are proposing to retain the notification requirement to allow district engineers to review all activities authorized by this NWP. Evidence of the original design capacity and configuration of the facility must be submitted with the notification. This information allows district engineers to review the proposed work to ensure that the removal of sediment is for maintenance, not new dredging or excavation.

Two commenters stated that irrigation and farm ponds should be removed from the proposal as they are not related to outfalls, while many commenters objected to the inclusion of excavation in small impoundments under this NWP. Another commenter stated that the maintenance of water treatment facilities, irrigation ponds, and farm

ponds, is exempt from Section 404 permit requirements.

In the July 1, 1998, **Federal Register** notice, we stated that the proposed modifications to NWP 7 could be used to authorize the removal of accumulated sediments from intake and outfall structures in small impoundments, such as irrigation ponds and farm ponds. This statement is in error, since the construction and maintenance of farm, stock, and irrigation ponds does not require a Section 404 permit (see 33 CFR Part 323.4(a)(3)), provided the work does not trigger the recapture provision of Section 404(f)(2) of the Clean Water Act (see 33 CFR Part 323.4(c)). The removal of sediments from small impoundments is limited to the excavation of sediment around the intake or outfall structure, if that activity is not exempt under Section 404(f). Water treatment facilities may be constructed in waters of the United States, and possibly Section 10 waters. The proposed modification of NWP 7 authorizes removal of accumulated sediments in the vicinity of intake and outfall structures constructed in waters of the United States for water treatment facilities.

One commenter opposed modifying NWP 7 to authorize activities in non-tidal waters, believing that this would open up thousands of acres of wetlands and streams to destruction. One commenter stated that since the proposed modification had no quantitative limits for impacts, this NWP could cause significant and unmitigated individual and cumulative adverse impacts. Two commenters stated that no activities in tidal areas or areas adjacent to, or contiguous with, tidal waters should be authorized by this NWP. Two commenters further requested that outfall structures associated with large facilities, such as aquaculture facilities or power plants, should be reviewed under an individual permit.

NWP 7 is applicable in all waters of the United States, including navigable waters. The proposed modification of NWP 7 authorizes only the construction of outfall structures and associated intake structures and maintenance dredging or excavation of accumulated sediments in the vicinity of outfall and intake structures and associated canals. These activities will not result in the destruction of thousands of acres of wetlands and streams, because most outfall structures are fairly small and the authorized excavation or dredging activities are only for maintenance. The removal of accumulated sediments from an existing intake or outfall structure or canal will not open up thousands of

wetlands and streams to destruction. Furthermore, since the authorized removal of accumulated sediment will be limited to the minimum necessary to restore the facility to its original design capacity, the adverse effects on the aquatic environment will usually be minimal. The District Engineer will have the opportunity to review all proposed NWP 7 activities on a case-by-case basis and will be able to add any necessary conditions, including compensatory mitigation requirements, to ensure that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. For those activities that may result in more than minimal adverse effects on the aquatic environment, district engineers will exercise discretionary authority. This NWP can be utilized for outfalls associated with aquaculture or power plants. All outfalls proposed under this NWP must be authorized, exempted, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program.

Several commenters suggested adding restrictions during fish spawning and nesting periods. One commenter recommended adding two additional conditions because of potential impacts to manatees. Another commenter recommended that this permit contain a condition requiring that shorelines affected by activities authorized under this permit should be revegetated.

General Condition 20 states that activities including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. This condition further states that activities that physically destroy important spawning areas are not authorized. In addition, limitations in specific waters for certain species are more appropriately addressed as regional conditions or case-specific special conditions. Activities that may affect Federally-listed endangered or threatened species or designated critical habitat must comply with General Condition 11. Districts are encouraged to establish local operating procedures to provide better protection for these species and their critical habitat.

General Condition 3, Soil Erosion and Sediment Control, requires the permittee to utilize appropriate soil erosion and sediment controls during construction and permanently stabilize the site at the earliest practicable date. This requirement may be fulfilled through vegetative stabilization

methods. In addition, following project completion, some areas may naturally revegetate. We do not believe that it is necessary to incorporate an additional requirement into the NWP. Where necessary, revegetation can be required by district engineers on a case-by-case basis through special conditions or regional conditions. In some cases, mitigation requirements may also address this issue, particularly where the permittee is required to establish and maintain a vegetated buffer.

One commenter stated that NWP 7 should clearly state that it authorizes removal of accumulated sediment in and around intake pipes and not just around intake pipes. Several commenters requested that this NWP authorize removal of accumulated sediment in the vicinity of intake and outfall structures for engineered flood control facilities, including dams, flood control facilities, and large reservoirs. One commenter asked why NWP 7 does not authorize the construction of intake structures only, because they result in similar adverse effects on the aquatic environment as outfalls.

The proposed modification of this NWP authorizes the removal of sediments blocking or restricting outfall or intake structures. This includes sediment removal from inside of the intake structure. This NWP does not authorize the construction of new canals or the removal of sediment from the head works of large dams, flood control facilities, or large reservoirs. Individual permits, regional general permits, or other NWPs such as NWPs 19 or 31, may authorize these activities. NWP 7 does not authorize the construction of intake structures without associated outfall structures because of the potential for more than minimal adverse effects on the aquatic environment where an intake structure may be constructed in a waterbody to withdraw water. If the water is not returned to the waterbody through an outfall structure, there may be more than minimal adverse effects to aquatic organisms and local water supplies, especially in arid regions of the country.

This NWP is subject to proposed General Conditions 25 and 26, which will reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 7 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent

wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

12. Utility Line Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify this NWP to authorize activities commonly associated with utility lines, such as the construction of electric or pumping substations, foundations for overhead utility line towers, poles, and anchors, and access roads. Many of these activities may have been authorized by NWP 26.

General comments: We received many comments addressing the proposed changes to NWP 12. Some commenters suggested leaving NWP 12 unchanged. Other comments ranged from supporting the issuance of the proposed modifications of NWP 12 to recommending the revocation of NWP 12. Many commenters concurred with the proposed acreage limits and PCN thresholds for the additional activities included in this NWP. Some commenters proposed higher acreage limits and PCN thresholds. Other commenters recommended lower acreage limits and PCN thresholds for the additional activities. Many commenters stated that the proposed changes would improve the efficiency of the NWP program and prevent the increase of regulatory burdens, without causing more than minimal adverse effects on the aquatic environment.

Many commenters expressed opposition to the expansion of NWP 12 to authorize utility line substations, foundations for utility towers, and permanent access roads. These commenters stated that this proposal would be a major expansion of the limits of NWP 12, resulting in significant losses of wetlands and other waters of the United States. Several commenters stated that there would no longer be any incentive to locate these facilities in uplands because the proposed modification would authorize their construction in wetlands. Some commenters believe that concerns regarding individual and cumulative

adverse effects on the aquatic environment resulting from the modification of NWP 12 could be addressed through the regional conditioning process.

We believe the NWP terms, limits, and notification requirements, will help to ensure that the proposed modification of NWP 12 authorizes only those utility activities with minimal adverse effects on the aquatic environment. The review of PCNs by district engineers and the regional conditioning process will ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment and will address regional and watershed concerns. The notification provisions of NWP 12 will allow district engineers to exercise discretionary authority for those utility line activities that may result in more than minimal adverse effects on the aquatic environment.

One commenter recommended combining utility lines with roads and other linear projects into one NWP permit and authorizing other utility line activities that are not linear in nature, such as substations and foundations for overhead utility lines, by another NWP because they are more similar in nature.

We believe that utility line substations, foundations for utility line towers, and permanent access roads for utility line maintenance are more appropriately authorized by NWP 12, instead of a separate NWP for these activities, because these activities are integral to single and complete utility line projects and the adverse effects for these activities should be considered under one NWP. All of the activities identified in NWP 12 are associated with typical utility projects and are similar in nature to other utility projects. We have changed the title of this NWP from "Utility Activities" to "Utility Line Activities" to better reflect the related nature of these activities for utility line construction, maintenance, and operation. We also believe that most of these projects, when conducted within the specified limits of the NWP, will have no more than minimal adverse impact on the aquatic environment. Finally, in those cases where proposed activities may have more than minimal adverse effects on the aquatic environment, we believe that the notification and regional conditioning processes will serve to ensure that the NWP authorizes only utility line activities with minimal adverse effects on the aquatic environment.

One commenter made the following recommendations concerning NWP 12: (1) The NWP should apply only to previously developed areas and well-

established utility corridors; (2) the clearing of forested wetlands should be excluded from this NWP; (3) the NWP should be excluded from wetlands in migratory corridors or near wetlands heavily used by migratory birds; and (4) the NWP should contain a provision requiring the planting of native species in disturbed areas and the removal of noxious and invasive plant species. Another commenter recommended excluding the use of NWP 12 in special aquatic sites and endangered species habitat.

We do not agree with the recommendations in the previous paragraph. NWP 12 authorizes only those utility activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. It is unnecessary and impractical to limit NWP 12 only to activities in existing utility corridors. If the proposed utility line will result in more than minimal adverse effects on the aquatic environment, district engineers can exercise discretionary authority and require an individual permit. Regional conditioning or case-by-case discretionary authority is the best mechanism to address potential adverse effects to wetland habitat. Regional conditions can also address concerns for revegetating areas temporarily affected by the authorized work. District engineers can add special conditions to NWP 12 authorizations to specify certain plant species to be planted in disturbed areas. General Condition 11 adequately addresses potential effects of the use of NWP 12 on Federally-listed endangered or threatened species or designated critical habitat.

Utility lines: One commenter recommended limiting NWP 12 to utility lines that are less than 10 miles in length and six inches in diameter, with an acreage limit of 2 acres. Other recommended acreage limits included 1 acre and $\frac{1}{3}$ acre. One commenter expressed concern about allowing sidecast material to remain in waters of the United States for up to six months, particularly in tidally influenced waters. To minimize adverse effects to marine fisheries, this commenter recommended conditioning NWP 12 to require the permittee to leave gaps in sidecast material at minimum intervals of 500 feet and prohibiting the placement of sidecast material in a manner that blocks natural surface water flows. Another commenter recommended prohibiting sidecasting of material during utility line maintenance activities to protect unique wetland functions. Some commenters questioned the requirement that excess material

must be removed to upland areas immediately upon completion of construction and one recommended that, in light of the recent Fifth Circuit Court of Appeals ruling in *American Mining Congress, et al. v. Corps of Engineers*, the Corps move the sentence concerning excess material to paragraph (i) of NWP 12. This commenter also stated that they assume that this requirement is intended to apply only to soil or other material that is dredged or excavated in significant quantities and redeposited at another location within a water of the United States, and not to clearing vegetation above ground.

Regional conditioning is the best mechanism for placing acreage limits on utility line construction, if division engineers believe that the cumulative adverse effects of utility line construction may result in more than minimal adverse effects on the aquatic environment within a particular region. Regional conditions are also the best way to address concerns regarding the maximum amount of time sidecast material should remain in waters of the United States and whether or not gaps or culverts should be placed in the temporary piles of excavated material to maintain surface water flows. In addition, General Condition 21, Management of Water Flows, requires that the permittee conduct the work so that preconstruction water flow patterns are maintained to the maximum extent practicable after completion of the authorized work.

The requirement for removing excess fill materials upon completion of construction will be retained in this NWP. This NWP authorizes temporary fills to install the utility line, such as sidecasting into waters of the United States during installation, provided the permittee backfills the trench. Any excavated material placed in waters of the United States that is not used to backfill the trench must be removed upon completion of the work or it will be considered a permanent fill requiring a separate Section 404 permit. An important requirement to ensure that activities authorized by NWP 12 will have no more than minimal adverse effects on the aquatic environment is the requirement to maintain preconstruction contours and elevations as close as possible after completion of the authorized work. Clearing vegetation by cutting it above the soil surface does not require a Section 404 permit, as long as there is no discharge of dredged or fill material into waters of the United States. In addition, if the proposed work is in a forested wetland, any mechanized landclearing which results in a discharge of dredged or fill material

will require a PCN. The Corps believes it is necessary to retain this provision to ensure that this NWP authorizes activities with only minimal adverse effects on the aquatic environment.

One commenter recommended that the NWP contain a requirement that all wastewater lines have no-seam pipes beneath perennial or intermittent streams to reduce the potential for untreated wastewater leaking into these streams. Another commenter recommended conditioning NWP 12 to require the installation of anti-seep collars at the downstream wetland boundary and every 150 feet up the gradient until the utility line exits the wetland at the upstream or up-slope end to prevent the lateral draining of the wetland caused by the gravel bed beneath the utility line. One commenter recommended requiring perpendicular (between 75 and 105 degrees) stream crossings.

General Condition 2, Proper Maintenance, requires that permittees maintain all authorized structures or fills to ensure public safety. Permittees must also comply with Section 402 of the Clean Water Act, which requires a permit for the discharge of effluent into waters of the United States. Wastewater lines must be designed and maintained so that they do not leak untreated wastewater into waters of the United States. NWP 12 also includes a requirement that a utility line may not be constructed in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, which may create a french drain effect, and failing to take appropriate measures to prevent the lateral draining of a wetland).

We believe that perpendicular stream crossings are environmentally preferable in many situations. However, these types of crossings are not always feasible and we have determined that it is better to require notification where a utility line is proposed to be placed within a water of the United States and runs parallel to a stream bed within that jurisdictional area. These projects will be reviewed on a case-by-case basis to determine if the activities would have more than minimal adverse effects on the aquatic environment. In addition, regional conditions can address concerns about certain activities and/or impacts to certain waters of the United States.

Many commenters concurred with the statement in the preamble that the installation of subaqueous utility lines in waters of the United States should not be considered as resulting in a loss of waters of the United States if the area impacted by installation of the utility

line is the minimum necessary and preconstruction contours and elevations are restored after construction. A number of commenters expressed concern about adverse effects associated with utility projects and believe that compensatory mitigation should be required to offset those adverse effects. Some commenters also questioned why the term "loss" only applies to permanently affected waters of the United States. One commenter stated that the term "loss" should apply to the clearing of forested wetlands for the construction of overhead power transmission lines where the forest will not be allowed to grow back.

We believe that the installation of utility lines that results only in temporary adverse effects on waters of the United States should not be considered a loss if preconstruction contours and elevations are restored after construction and there are no permanent adverse effects to the aquatic environment resulting from the activity. While temporary adverse effects to water quality, fish and wildlife habitat, and other components of the aquatic environment may result, the areas typically return to preconstruction conditions if the terms and conditions of the NWP are met. In these cases, compensatory mitigation should not be required. However, should the installation of a utility line result in the permanent conversion of a forested wetland to another wetland type in a permanently maintained right-of-way, compensatory mitigation may be required by the District Engineer if it is necessary to ensure that the authorized work will result in minimal adverse effects on the aquatic environment. Finally, in those cases where the proposed work may result in more than minimal adverse impact on the aquatic environment, we believe the notification and regional conditioning processes will ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. In addition, compensatory mitigation can be required for any NWP 12 activity requiring a PCN to ensure that the adverse effects of the authorized work on the aquatic environment are minimal, individually or cumulatively. The NWP already contains provisions addressing the clearing of forested wetlands. District engineers will determine if compensatory mitigation should be required for the conversion of a forested wetland to an emergent or scrub-shrub wetland in a maintained utility line corridor.

In the first sentence of paragraph (i), we have stated that NWP 12 authorizes the maintenance and repair of utility

lines in addition to their construction. Since NWP 12 can be used to authorize the construction of utility lines in both Section 10 and Section 404 waters, we have added the phrase "in all waters of the United States" to the text of paragraph (i).

Utility line substations: Some commenters recommended that the Corps withdraw this part of the proposed modification of NWP 12. Many commenters recommended higher acreage limits, ranging from 2 to 3 acres. A number of commenters recommended lower acreage limits. One commenter requested that the Corps clarify what is meant by the term "pumping substations" and suggested using the term "compressor station" instead.

We believe that the 1 acre limit for the construction of utility line substations is appropriate to authorize the construction of most utility line substations with minimal adverse effects on the aquatic environment. However, we have lowered the PCN threshold for the construction of utility line substations to $\frac{1}{4}$ acre, to make it more consistent with the other proposed new and modified NWPs. We also agree that some clarification is appropriate to specify the types of utility line substations are authorized by paragraph (ii). The term "utility line substations" includes power line substations, lift stations, pumping stations, meter stations, compressor stations, valve stations, small pipeline platforms, and other facilities integral to the operation of a utility line.

For the proposed modification of NWP 12, the construction or expansion of utility line substations in waters of the United States is limited to non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters. We have added this language to paragraph (ii) to clarify the applicable waters for utility line substations authorized by NWP 12, and to make those applicable waters consistent with most of the other proposed NWPs.

Foundations for overhead utility line towers, poles, and anchors: One commenter recommended eliminating the requirement to use separate footings for utility line towers where feasible. Another commenter noted that in certain situations where hurricanes, high winds, and lightning occasionally cause damage to power line structures and conductors, it is better to construct a single pad beneath the footings. The commenter requested modification of the NWP to allow single pad fills as long as they result in the loss of less than $\frac{1}{3}$ acre of waters of the United States.

We have decided to retain the proposed language because it provides

flexibility. The phrase "where feasible" does not prohibit the construction of a single pad to support the utility line tower; it merely encourages the construction of separate footings. This phrase provides district engineers with the flexibility to use NWP 12 to authorize the construction of single pads where there are concerns due to hurricanes, high winds, and other dangerous conditions. District engineers can require the permittee to provide justification as to why a single pad should be constructed instead of separate footings. The only requirement is that the pads result in minimal adverse effects on the aquatic environment. District engineers can require compensatory mitigation for the losses of waters of the United States resulting from the construction of single pads for overhead utility line towers.

Since the proposed modification of NWP 12 can be used to authorize the construction of foundations for overhead utility line towers, poles, and anchors in both Section 10 and Section 404 waters, we have added the phrase "in all waters of the United States" to the text of paragraph (iii).

Access roads: Many commenters recommended increasing the acreage limit for permanent access roads to 2 or 5 acres. One commenter recommended limiting permanent access roads to $\frac{1}{3}$ acre of loss of waters of the United States and a maximum width of 15 feet. Several commenters recommended excluding permanent access roads from this NWP. One of these commenters objected to the inclusion of permanent utility access roads because access roads fragment the landscape, which can adversely affect fish and wildlife habitat and the water quality functions of many wetland ecosystems. Another commenter requested that the NWP contain a provision requiring the permittee to submit justification explaining why permanent access roads are needed. One commenter suggested that the PCN contain a requirement for the submission of an engineering analysis demonstrating that the culvert size for the permanent access road is adequate, based on watershed acreage and the appropriate rainfall coefficient. One commenter expressed concern about inconsistent statements in paragraph (iv) and the preamble discussion relating to the effects of the access roads on subsurface flows. This commenter questioned whether the Corps had the authority to regulate subsurface waters. A commenter asked the Corps to clarify the meaning of "minimum width necessary" as well as the acceptable length of road, and questioned who would make such

determinations. Further, this commenter asked who decides whether preconstruction contours are maintained as near as possible. One commenter recommended adding a term to the NWP requiring that access roads be constructed with pervious surfaces.

We believe that the 1 acre limit for permanent access roads is appropriate to ensure that the NWP authorizes only those permanent access roads that result in minimal adverse effects on the aquatic environment. The PCN threshold remains the same as proposed in the July 1, 1998, **Federal Register** notice. The construction of permanent access roads for utility line maintenance has the same effects on landscapes as the construction of utility line right-of-ways because the access roads are usually constructed within the right-of-way. We do not believe that it is necessary for the applicant to provide justification for the construction of permanent access roads or an engineering analysis demonstrating the appropriateness of the culvert size. For those activities that require notification, district engineers will review the PCN and determine if the construction of permanent access roads will result in more than minimal adverse effects on the aquatic environment. Division engineers can also regionally condition NWP 12 to ensure that the construction of permanent access roads will result in minimal adverse effects.

We agree that we do not have the authority under Section 404 of the Clean Water Act to regulate groundwater flows. Therefore, we have deleted the reference to subsurface flows in paragraph (iv). The District Engineer determines if the access road is the minimum width necessary, as well as the appropriate length of access road, and if the access road will result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition NWP 12 to specify maximum widths and lengths of permanent access roads that can be authorized by this NWP. In cases where a PCN is required, the Corps will review the proposed work for compliance with the terms and conditions of the NWP. If a certain activity does not meet the terms and conditions of the NWP, another form of authorization must be obtained.

For the proposed modification of NWP 12, the construction of permanent access roads for the construction or maintenance of utility lines in waters of the United States is limited to non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. We have added this language to paragraph (iv) to clarify the applicable

waters for utility line access roads authorized by NWP 12. We have also added a provision stating that permanent access roads must be constructed with pervious surfaces.

Notification Requirements: Many commenters recommended eliminating the PCN requirement for mechanized landclearing in forested wetlands. One commenter questioned the requirement for notification in forested wetlands and requested an explanation for that requirement. Several commenters said that the PCN requirements for access roads should be consistent with the PCN requirements for roads under NWP 14. One commenter recommended decreasing the PCN threshold for utility lines installed in waters of the United States from 500 linear feet to 300 linear feet. Several commenters supported a minimum notification threshold of $\frac{1}{3}$ acre. Several commenters requested reduced thresholds for notification to ensure minimal impacts.

The PCN requirement for mechanized landclearing in a forested wetland has not been changed. This requirement was originally incorporated into NWP 12 for the December 13, 1996, reissuance of this NWP. The purpose of this notification requirement is to ensure that only minimal adverse effects on the aquatic environment will occur when the installation of a utility line occurs in forested wetlands. In the proposed modification of NWP 12 published in the July 1, 1998, **Federal Register**, we proposed to modify this notification requirement by limiting the circumstances requiring notification only to the establishment of the utility line right of way in a forested wetland, so that PCNs would not be required for any utility activity that involves mechanized landclearing of a forested wetland, such as the construction of a utility line substation. We are proposing to retain this requirement.

We disagree that the notification requirements for permanent access roads authorized by NWP 12 and linear transportation crossings authorized by NWP 14 should be the same. NWP 12 and NWP 14 authorize different types of roads utilized for different purposes. Permanent access roads authorized by NWP 12 must be constructed as close to preconstruction contours as possible and at the minimum width necessary. We expect most permanent access roads for utility lines to be a maximum of 15 feet wide. Because of construction and safety standards, many roads authorized by NWP 14 are likely to be wider than 15 feet, resulting in greater impacts to waters of the United States. We are proposing to retain the PCN thresholds for the construction of utility lines in

waters of the United States and the construction of access roads as proposed in the July 1, 1998, **Federal Register** notice.

Two commenters requested that the District Engineer, instead of the prospective permittee, notify the National Ocean Service (NOS) in cases where the utility line is to be constructed or installed in navigable waters of the United States.

We agree that it is more appropriate for the District Engineer to provide NOS with a copy of the PCN and NWP authorization, since the requirement at 33 CFR Part 325.2(a)(9)(iii) is to provide NOS with a copy of the permit for utility lines in navigable waters of the United States. We are proposing to add a note (Note 3) to the end of the text of NWP 12, reminding the District Engineer to send copies of the PCN and the NWP 12 authorization to NOS if the utility line is constructed in navigable waters of the United States.

Some commenters stated that the Corps should not require a delineation of special aquatic sites, including wetlands, as part of the NWP 12 PCN, or at least apply that requirement only to those projects that are subject to an acreage limitation. Some commenters recommended using simpler methods to delineate special aquatic sites. Other commenters suggested that the Corps adopt a procedure requiring Corps approval of a delineation of special aquatic sites within a reasonable period of time.

We disagree with the first comment in the previous paragraph because it is important to identify the limits and amounts of special aquatic sites that might be lost as a result of the proposed work to determine if additional on-site avoidance and minimization is possible and if the proposed project would have more than minimal adverse effects on the aquatic environment. The only approved method of determining the extent of wetlands is by the procedures in the 1987 *Corps of Engineers Wetlands Delineation Manual* (Technical Report Y-87-1). Other special aquatic sites are identified through other methods. For activities requiring notification, district engineers have 45 days from the date of receipt of a complete PCN to determine if the proposed work qualifies for NWP authorization. During the 45-day period, the District Engineer must determine if the delineation is accurate. District engineers cannot consider a PCN incomplete solely because they have not verified the delineation of special aquatic sites.

Other issues: One commenter recommended that the Corps add language to NWP 12 to waive the PCN

requirement for cases where a prospective permittee is working under a valid NPDES stormwater management permit.

We disagree, since the NPDES permit does not satisfy the permit requirements of Section 404 of the Clean Water Act. Review by the District Engineer is necessary to ensure that the authorized work complies with the terms and conditions of NWP 12 and results in minimal adverse effects on the aquatic environment.

Some commenters objected to compensatory mitigation requirements for public utility projects and others suggested that mitigation should only be required to the extent necessary to ensure that an activity has minimal adverse effects on the aquatic environment. Other commenters recommended requiring complete or partial restoration of areas altered by mechanized landclearing.

Public projects may have more adverse effects on the aquatic environment than private projects since they may be larger in size. Project proponents will be required to provide compensatory mitigation, if necessary, to ensure that the authorized work results in minimal adverse effects on the aquatic environment regardless of whether the project is for public or private purposes. For activities that require notification, compensatory mitigation may be required by district engineers to ensure that the net adverse effects to the aquatic environment are minimal, individually and cumulatively. Utility line right-of-ways in waters of the United States can be cleared for the construction, maintenance, or repair of utility lines, but the cleared area must be the minimum necessary and preconstruction contours must be maintained as close as possible. Wetland vegetation will grow back if the right-of-way is constructed in wetlands and preconstruction contours and elevations are restored after construction. However, the plant community may be maintained as shrubs or herbaceous plants, to prevent damage to the utility line and facilitate repairs. We believe that the conditions of NWP 12 adequately address temporary impacts to waters of the United States and that additional restoration requirements are not necessary.

Some commenters emphasized the importance of the regional conditioning process to address regionally significant resources such as vernal pools, headwater springs, prairie potholes, certain coastal wetlands to ensure protection of unique wetland functions.

Many commenters made recommendations for regional conditions.

We recognize that the regional conditioning process is a very important element in the implementation of the new and modified NWP but that specific recommendations for regional conditions must be addressed by division and district engineers.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. General Condition 26 prohibits the use of this NWP to authorize discharges resulting in the loss of greater than 1 acre of impaired waters, including adjacent wetlands. NWP 12 activities resulting in the loss of 1 acre or less of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of the waterbody. General Condition 27 prohibits the use of NWP 12 to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, unless the prospective permittee clearly demonstrates that the project and associated mitigation will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

14. Linear Transportation Crossings

In the July 1, 1998, **Federal Register** notice, we proposed several changes to this NWP. We proposed to modify this NWP to have a larger acreage limit for public transportation crossings, such as roads, railroads, and airport runways, in non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters. We also requested comments on whether the acreage limit for public transportation crossings in non-tidal waters should be 1 or 2 acres. For private crossings and public linear transportation crossings in tidal waters, or non-tidal wetlands

contiguous to tidal waters, we did not propose to change the original acreage limits of NWP 14.

One commenter stated that the NWP should not authorize public transportation crossings. A number of commenters said that the distinction between public and private transportation crossings is unnecessary. Many commenters requested that the Corps clarify what is meant by private and public transportation crossings. Several commenters asked whether roads to residential developments would be considered public or private.

NWP 14 previously authorized both public and private road crossings. Due to public interest factors, we proposed to increase the acreage limit for public transportation crossings for this NWP, with acreage limits based on the types of waters affected by the work. For the purposes of this NWP, a private crossing is restricted to the use of a particular person or group, and is not freely available to the public. An example is a driveway crossing a stream to provide access to a single family residence. A public crossing is a crossing which is intended to serve all citizens, rather than a specific limited group. As further clarification, if the responsibility for the highway or road maintenance and repair is a county, state, or government entity, the road will be considered public. To increase protection of the aquatic environment, we are proposing to change the applicable waters for linear transportation crossings as follows: (1) Public linear transportation crossings constructed in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, (2) public linear transportation crossings constructed in tidal waters and non-tidal wetlands adjacent to tidal waters, and (3) private linear transportation crossings constructed in all waters of the United States.

Many commenters requested that NWP 14 remain unchanged. Several commenters suggested that the acreage limit for public projects should be limited to 1 acre and the length of the crossing to no more than 200 feet. Other commenters stated that the proposed 2 acre limit for public transportation crossings is too low and would prefer the original 10 acre limit that NWP 26 had prior to December 1996. Many commenters said that 2 acres is sufficient for public highways, which often have 2 to 4 lanes. Several commenters stated that public linear transportation crossings should have no acreage limit while others said the limit is too high and that the proposed modification should be withdrawn. Another commenter recommended

removing the 200 linear foot limit for private crossings and replacing it with a 500 linear foot limit.

We have carefully considered all comments on the proposed acreage limits. The existing limit for private crossings is retained at $\frac{1}{3}$ acre and 200 linear feet. For public projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, we have decided the proposed 1 acre limit for public linear transportation crossings is appropriate to authorize most public linear transportation crossings that have minimal adverse effects on the aquatic environment in non-tidal waters. It is important to note that each crossing of a separate waterbody is a single and complete project (see 33 CFR Part 330.2(i)). The $\frac{1}{3}$ acre and 200 linear foot limits will be retained for private linear transportation crossings and public linear transportation crossings in tidal waters and non-tidal wetlands adjacent to tidal waters.

Some commenters asked why the acreage limit for public projects was higher than the acreage limit for private projects. Many objected to the differences in acreage limits. Several commenters were concerned that the proposed modification establishes different thresholds based upon whether a project is private or public.

During our review of transportation projects authorized by NWP 26, we found that there were a substantial number of public linear transportation crossings with minimal adverse effects on the aquatic environment. Approximately 90% of the transportation projects authorized by NWP 26 during 1997 resulted in the loss of less than 1 acre of non-tidal waters. The proposed modification of NWP 14 is intended to authorize these types of projects, since NWP 26 will be replaced by the proposed new and modified NWPs announced in this **Federal Register** notice. Public linear transportation crossings need to be larger, because they must have larger capacities. Private crossings, on the other hand, are typically small. Public linear transportation crossings also fulfill a greater proportion of public interest factors, and the government entities that typically sponsor or build these projects have the resources and experience necessary to design these projects and provide necessary compensatory mitigation to ensure that these projects have minimal adverse effects on the aquatic environment. Consequently, these projects are less likely to be contrary to the public interest. Public transportation projects often require detailed planning

processes to document compliance with NEPA, Section 404 of the Clean Water Act, and many other applicable laws. As a result, we have decided that it is appropriate to impose a higher acreage limit for public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Public roads serve the general public and allow access for entire communities. Other transportation facilities, such as municipal airport runways or railroads are constructed for public transportation needs, and are considered public if they are accessible to the public as a whole. Railroad crossings may be constructed by private entities, but may be used by public transportation agencies for mass transit, such as commuter rail services. As long as these transportation facilities are used by the general public, providing a means of transportation for an entire community, these linear transportation crossings will be considered public for the purposes of this NWP.

Many comments were received regarding PCN thresholds. Several commenters suggested that notification should be required for all projects authorized by this NWP. Some commenters stated that the proposed notification requirements were too stringent and some wetland impacts should be authorized without any PCN requirements. These commenters stated that the PCN requirement should be consistent with the notification requirements of NWP 12, and recommended that notification should be required if the activity results in the loss of more than $\frac{1}{3}$ acre of non-tidal wetlands or the impact exceeds 500 linear feet in waters of the United States. Another commenter said that the PCN threshold should be raised to $\frac{1}{2}$ acre. One commenter stated the notification requirements for public and private linear transportation projects should be the same. Another commenter wanted to know how Corps Districts would identify areas of high value that could trigger lower PCN thresholds.

To make the PCN thresholds of NWP 14 more consistent with the new NWPs, the proposed notification threshold has been modified. The proposed PCN thresholds for public and private linear transportation crossings are the same. Notification will be required for activities that result in the loss of greater than $\frac{1}{4}$ acre of waters of the United States. Notification will also be required for all activities that result in a discharge into special aquatic sites, including wetlands. We do not agree that the PCN thresholds of NWP 14 should be the same as the PCN

thresholds of NWP 12 because the activities authorized by these NWPs have different adverse effects on the aquatic environment. High value waters will be identified through the regional conditioning process. Division engineers can regionally condition this NWP to lower the PCN threshold or require notification for all activities in specific high value waters.

Numerous commenters requested clarification concerning what constitutes a single and complete linear project. Several commenters recommended that the Corps eliminate the practice of piecemealing road projects so that NWP 14 authorizes each separate wetland or stream impact along the construction corridor. Another commenter suggested that the Corps consider allowing the use of this NWP for multiple crossings provided the "no net loss" goal is met.

Our NWP regulations already address linear projects and what constitutes a single and complete linear project (see 33 CFR Part 320.2(i)). In paragraph (h) of the proposed modification of this NWP, we have provided additional clarification concerning when discretionary authority may be exercised for road segments with multiple crossings of streams.

Many commenters believe that airports and runways should not be authorized by this NWP. Several commenters suggested that the secondary impacts of airport runway construction, such as chemicals and pollutants, are a serious concern. Several commenters questioned whether railroads are considered public entities.

The construction, improvement, and expansion of airport runways can be authorized by this proposed modification of this NWP, provided the adverse effects on the aquatic environment are minimal. These facilities are often subject to additional rigorous regulation by other State and Federal agencies. Airports will have existing stormwater and water quality management plans, and are likely to be closely regulated with regard to air quality, noise pollution, point and non-point source pollution, and hazardous and toxic substances. Since this NWP requires a PCN for most projects, district engineers will have the opportunity to review the impacts of the proposed activity. If a project will have more than minimal adverse effects on the aquatic environment, the District Engineer will assert discretionary authority and require an individual permit. Railroads will typically be considered public transportation because, as previously discussed, a railroad may be constructed by a private entity, but the tracks are

often utilized by the general public for public transportation. As long as these facilities are generally accessible to the public, by providing a means of mass transit or services for a community, railway crossings will be considered public.

One commenter stated that regional conditions should prohibit the disruption of water flows by requiring culverts, bridges, etc. Another commenter asked for clarification of the terms in paragraph (g) of the proposed NWP 14 modification. Another commenter requested that applicants provide detailed engineering information on the crossings to ensure that they are designed properly.

General Condition 21, Management of Water Flows, requires NWP activities to be designed and constructed to maintain preconstruction downstream flow conditions, to the maximum extent practicable. Activities authorized by this NWP should not result in more than minor changes to the hydraulic flow of a stream and should not result in an increase in flooding upstream or downstream of the crossing. Proposed General Condition 27 also applies to activities authorized by this NWP. To construct the crossing, some work in the stream channel is necessary. Examples include bank stabilization, the placement of fill and culverts, depressing the culvert into the stream bed, etc. All of this work should take place only in the immediate vicinity of the crossing. The construction of the crossing should result in only minor impacts to the hydraulic characteristics of the stream. General Condition 9, Water Quality, requires the permittee to implement a water quality management plan to ensure the work does not cause more than minimal adverse effects to the downstream aquatic system. In general, where a state or tribal entity requires such a plan, this requirement will be considered fulfilled. If a water quality management plan is not required by the state, the District Engineer must decide if one is needed for the proposed activity. We do not agree that applicants should be required to provide detailed engineering information concerning the crossing. It is incumbent upon the permittee to ensure that the crossing is designed so that it complies with all of the conditions of the NWP, especially General Condition 21.

One commenter questioned why a mitigation plan was required for public linear transportation projects but not for private crossings. Several commenters asked whether compensatory mitigation would be required for all crossings.

We have modified this provision of NWP to require a mitigation proposal

for both public and private linear transportation crossings. Paragraph (c) of the proposed modification of NWP 14 requires the prospective permittee to submit a mitigation proposal to offset permanent losses of waters of the United States and a statement describing how temporary losses will be minimized to the extent practicable.

Many commenters objected to the inclusion of attendant features to the linear transportation project, such as interchanges, stormwater detention basins, rail spurs, or water quality enhancement measures in the NWP. Many commenters approved the inclusion of such features, and a couple of commenters requested that the NWP authorize non-linear features such as vehicle maintenance or storage buildings, parking lots, train stations, and hangars. One commenter said that this NWP should not authorize new transportation facilities, which typically result in significant indirect and cumulative impacts.

Features integral to the crossing, such as interchanges, rail spurs, stormwater detention basins, and water quality enhancement measures are authorized by this NWP. This requirement will help ensure that the adverse effects of the entire single and complete project are considered. The attendant features must be integral to the crossing, however, and the combined loss of waters of the United States for a single and complete project cannot exceed the acreage limit of this NWP. We are not proposing to modify NWP 14 to authorize non-linear transportation activities, because these activities have greater potential to result in more than minimal adverse effects on the aquatic environment.

The proposed modification of this NWP can authorize the construction of new linear transportation crossings, provided the proposed work results in minimal adverse effects on the aquatic environment. The notification requirements, the District Engineer's ability to impose special conditions on a particular activity, and the District Engineer's ability to exercise discretionary authority and require an individual permit will ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment.

Several commenters recommended adding conditions that appear to apply to specific regions. One commenter requested that: this NWP should be prohibited in watersheds with substantial aquatic resource losses and in watersheds which have impervious surfaces over a substantial percentage of the landscape; the acreage limits be

modified to protect regionally significant resources; linear foot limitations should be imposed on activities in streams with regionally important resources; kick-out provisions should be provided for Federal agencies; and compensatory mitigation should be required to fully offset all impacts to ensure no net loss of aquatic resources. Another commenter requested that this NWP: prohibit activities below the existing water level of the stream, limit work affecting water quality between March 15 and June 15, prohibit the use of stream bed material for erosion control, limit the use of rip rap, limit clearing of forested stream corridors to the minimum necessary, require revegetation of disturbed areas to reduce erosion, require culverts for temporary rock stream crossings higher than 18 inches, maintain stream bed gradient during construction, and size and place culverts to avoid creating a drop between the downstream end of the culvert and the downstream water surface elevation.

All of the recommendations cited in the previous paragraph are best addressed as regional conditions and case-specific special conditions for an NWP authorization.

A couple of commenters requested that this NWP authorize some stream channelization. Several commenters requested that this NWP prohibit stream channelization.

Paragraph (f) of the proposed modification of NWP 14 states that this NWP cannot be used to channelize a stream, but some channel modification in the immediate vicinity of the crossing can be conducted to ensure that water flow through the crossing does not result in additional flooding, erosion, or other adverse impacts that may compromise public safety.

One commenter was confused about the manner in which the authorized activities and applicable waters were described. We have clarified this section, with the acreage limits for each category of activities and applicable waters.

This NWP is subject to proposed General Conditions 25, 26, and 27, which will substantially reduce its applicability. General Condition 25 prohibits the use of this NWP to authorize discharges into designated critical resource waters and wetlands adjacent to those waters. Due to the requirements of General Condition 26, NWP 14 activities resulting in the loss of impaired waters, including adjacent wetlands, are prohibited unless prospective permittee demonstrates to the District Engineer that the activity will not result in further impairment of

the waterbody. General Condition 27 prohibits the use of NWP 14 to authorize permanent, above-grade wetland fills in waters of the United States within the 100-year floodplain, unless the prospective permittee clearly demonstrates that the project and associated mitigation will not decrease the flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the 100-year floodplain.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

27. Stream and Wetland Restoration Activities

In the July 1, 1998, **Federal Register** notice, we proposed to modify NWP 27 to authorize the restoration of non-Section 10 streams, in addition to the wetland and riparian restoration and enhancement activities already authorized by this NWP.

Some commenters supported the proposed modifications. Other commenters said that no restrictions should be placed on the NWP. Several commenters stated that the NWP meets the criteria for minimal effects. One commenter supported modification of NWP 27 to authorize activities on private property. Several commenters opposed the proposed modifications to NWP 27 because they believe that wetlands and streams would be adversely affected by the proposed changes.

The purpose of the proposed modification of NWP 27 is to authorize the restoration of non-tidal streams. NWP 27 previously authorized only the restoration former non-tidal wetlands and riparian areas, the enhancement of degraded wetlands and riparian areas, and the creation of wetlands and riparian areas. We are also proposing to modify NWP 27 to authorize the restoration of tidal waters. Currently, NWP 27 only authorizes the restoration of non-tidal wetlands and riparian areas. The enhancement of degraded wetlands and riparian areas and the creation of wetlands and riparian areas is authorized in all waters of the United States, including tidal waters. We believe, that by adding stream and tidal wetland restoration activities to this NWP, that the overall aquatic

environment will benefit by providing an efficient means of authorizing the restoration and enhancement of these areas.

One commenter recommended eliminating wetland restoration activities from this NWP and limiting it only to enhancement activities. This commenter believes that restoration activities do not require a Section 404 permit because the project area is not currently a wetland. Another commenter asked if NWP 27 applies to the restoration of riparian zones outside of wetlands and other waters of the United States.

Many wetland restoration activities require a Section 404 permit because there are discharges into waters of the United States that are necessary to conduct the restoration activity, such as connecting the restored wetland to other waters of the United States. The same principle applies to wetland creation activities. NWP 27 authorizes the restoration of riparian zones that are waters of the United States (e.g., wetlands adjacent to a stream) and activities in waters of the United States associated with the restoration of upland riparian zones. For example, to establish a vegetated upland riparian zone, some bank stabilization activities in waters of the United States may be necessary, such as the planting of willows along the bank. If the proposed riparian zone restoration activity is conducted entirely outside of waters of the United States, then no Corps permit is required.

One commenter requested the inclusion of more examples of stream restoration and enhancement activities, such as the addition of spawning gravel and the removal of accumulated sediment from ponds to prevent sediments from being washed downstream. Another commenter stated that the list of examples of authorized activities in the NWP is too inclusive and vague. Other commenters expressed concern that activities not directly related to the restoration of ecological values or aquatic functions could be authorized by this NWP. Several commenters recommended excluding the placement rip rap from NWP 27 and that the appropriate use of biological materials should be encouraged.

The list of activities in the paragraph following paragraph (c) of the proposed modification of NWP 27 is intended only to provide examples and is not a complete list of activities authorized by this NWP. The next paragraph in NWP 27 lists activities that are not authorized by the NWP. If the prospective permittee has questions about a particular stream and wetland

restoration or enhancement activity, then he or she should contact the District Engineer to determine if the proposed work can be authorized by NWP 27. For those projects requiring notification, the District Engineer will determine if the proposed work satisfies the terms and conditions of NWP 27 and will exercise discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment. Division engineers can also regionally condition this NWP to exclude certain activities or prohibit its use in specific waterbodies or geographic regions. We do not agree that the use of rip rap should be excluded from this NWP, because rip rap provides habitat for many aquatic organisms and can help reduce adverse effects to water quality resulting from soil erosion on the project site.

A number of commenters were confused about the scope of this NWP and asked which types of waters are subject to this NWP. Several commenters recommended expanding the applicable waters for this NWP to include Section 10 waters. Other commenters suggested excluding tidal wetlands from this NWP. One commenter stated that the NWP should be used only in small lengths of streams or small wetland areas.

We have modified the first paragraph of the proposed modification of this NWP to clarify the scope of applicable waters for this NWP. Since its issuance in 1991, NWP 27 has authorized wetland and riparian restoration, enhancement, and creation activities in Section 10 waters, although certain activities were restricted to non-tidal Section 10 waters. This NWP authorizes activities that restore former waters, including tidal and non-tidal wetlands, enhance degraded tidal and non-tidal wetlands and riparian areas, create tidal and non-tidal wetlands and riparian areas, and restore and enhance non-tidal streams and non-tidal open waters. This NWP can be used to restore and enhance Section 10 streams and open waters, as long as they are non-tidal. Other Section 10 activities authorized by this NWP include the restoration of former non-tidal wetlands in Section 10 waters, the enhancement of degraded wetlands in navigable waters, and the creation of wetlands in navigable waters.

Restricting the use of this NWP to small segments of streams and small wetlands is unnecessary because this NWP authorizes only those activities that improve the aquatic environment. Adding such a restriction is also likely to discourage larger stream and wetland restoration and enhancement projects by

requiring prospective permittees to go through a more complicated and expensive permit process.

Many commenters recommended conditioning this NWP to prohibit conversion and alteration of habitat. One of these commenters recommended prohibiting the conversion of one aquatic habitat type to another type unless the intent of the conversion is to restore the area to an aquatic habitat type that historically existed on that site. One commenter recommended including a provision in the NWP to allow the construction of small impoundments in ephemeral and/or intermittent reaches of streams to benefit water quality and waterfowl.

The proposed modification of this NWP prohibits the conversion of natural streams or wetlands to another aquatic use, unless the permittee recreates similar aquatic habitat types in a different location on the project site and the project results in aquatic resource functional gains. However, only non-tidal waters can be converted to other types of aquatic habitat. We are proposing to modify the text of the NWP to specify that any relocated non-tidal aquatic habitat type must be created on the project site, so that the relocation is not limited to creating the aquatic habitat type in adjacent uplands. We have added a prohibition against converting tidal waters, including tidal wetlands, to other aquatic uses or relocating tidal waters. We do not believe that is necessary to limit the conversion to aquatic habitat types that historically existed on the project site, because the permittee may want to conduct activities that provide more benefits to the aquatic environment than the historic aquatic habitat type provided. This NWP can authorize small impoundments in ephemeral and/or intermittent streams, provided those aquatic habitat types are recreated on the project site, the adverse effects on the aquatic environment are minimal, and there are net functional gains.

Several commenters expressed concern with the use of this NWP with other permits. Other commenters were uncertain as to whether General Condition 15 applies to NWP 27.

NWP 27 may be used with other NWPs to authorize a single and complete project, provided the authorized work results in minimal adverse effects on the aquatic environment, individually or cumulatively. For example, NWP 33 may be used to provide temporary access to the construction site for activities authorized by NWP 27. The proposed modification of General